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IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Executive Order No. 13202 flatly prohibits construction managers retained by federal agencies or recipients of federal assistance from negotiating project labor agreements ("PLAs") specifying that all contractors and subcontractors working on a construction project must agree to adhere to the PLA. In contrast, the National Labor Relations Act ("NLRA"), as amended through NLRA §§8(e) and (f), 29 U.S.C. §§158(e) and (f), expressly authorizes a construction manager retained by a property owner to negotiate such PLAs with construction unions on construction projects in and affecting commerce, including federal and federally assisted construction projects. This case, challenging Executive Order No. 13202 as an improper intrusion into the exclusive NLRA regulatory regime established by Congress, raises two questions:

1. Whether Executive Order No. 13202 is "regulatory" government procurement action that is subject to preemption analysis or "proprietary" action that is immune from such analysis; and

2. Whether Executive Order No. 13202 is government procurement action that, under the NLRA's preemption principles, improperly intrudes into the exclusive labor relations regulatory scheme established by Congress.

PARTIES

Petitioners Building and Construction Trades Department, AFL-CIO, City of Richmond, California, and the Contra Costa Building and Construction Trades Council were plaintiffs-appellees in the proceedings before the Court of Appeals.

Defendants-appellants in the proceedings below were Joe Allbaugh, Director of the Federal Emergency Management Agency; Mel Martinez, Secretary of the U.S. Department of Housing and Urban Development; Norman Y. Mineta, Secretary of the U.S. Department of Transportation; Thurman M. Davis, Sr., then-Acting Administrator, U.S. General Services Administration, and Member, Federal Acquisition Regulatory ("FAR") Council; Donald H. Rumsfeld, Secretary, U.S. Department of Defense, and Member, FAR Council; Daniel S. Goldin, then-Administrator, National Aeronautics and Space Administration, and Member, FAR Council; and Henri Jamioy Quistial, then-Administrator for Federal Procurement Policy, Office of Management and Budget, and Member, FAR Council.

Since the close of the litigation below, several of the individual government parties have changed. Stephen Perry has been appointed Administrator, U.S. General Services Administration, and Member, FAR Council, replacing Thurman M. Davis. Sean O'Keefe has been appointed Administrator, National Aeronautics and Space Administration, and Member, FAR Council, replacing Daniel S. Goldin. Finally, Angela B. Styles has been appointed Administrator for Federal Procurement Policy, Office of Management and Budget, and Member, FAR Council, replacing Henri Jamioy Quistial.

There are no parent companies or nonwholly owned subsidiaries involved.

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PETITION FOR A WRIT OF CERTIORARI

The Building and Construction Trades Department, AFL-CIO, the City of Richmond, California, and the Contra Costa Building and Construction Trades Council petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit, to review the decision and order in *Building and Construction Trades Department, AFL-CIO, et al. v. Joe Allbaugh, Director, Federal Emergency Management Agency, et al.*, 295 F.3d 28 (D.C. Cir. No. 01-5436, July 12, 2002).

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 295 F.3d 28, and is reprinted as Appendix A in the Appendix ("Pet. App.") to this *certiorari* petition. *See* Pet. App. 1a-14a. The decision of the United States District Court for the District of Columbia is published at 172 F. Supp.2d 138, and is reprinted as Appendix B. *See* Pet. App. 15a –73a.

JURISDICTION

The Court of Appeals' order was issued on July 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Executive Order No. 13202, 66 Fed. Reg. 11225 (Feb. 17, 2001), and its amendment, Executive Order No. 13208, 66 Fed. Reg. 18717 (April 11, 2001), are reprinted as Appendices C and D. *See* Pet. App. 74a-79a. Sections 8(e) and 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(e) and 158(f), are reprinted in relevant part as Appendix E. *See* Pet. App. 80a.

STATEMENT

On February 17, 2001, President George W. Bush signed four Executive Orders dealing with various labor relations matters. At issue in this case is Executive Order No. 13202, which "establish[es] the policy of the [Executive] with regard to the use of [project labor agreements] in federal and federally funded construction contracts." Pet. App. 2a.[1]

In its operative terms, the Executive Order flatly prohibits construction managers acting on behalf of a federal agency or a recipient of federal assistance from negotiating a project labor agreement ("PLA") binding on all the contractors and subcontractors doing work on a federal or federally-assisted construction project. The policy on PLAs that the Executive Order promulgates is directly contrary to Congress' policy, as stated in the National Labor Relations Act ("NLRA"), which explicitly authorizes the negotiation and implementation of the PLAs banned by the Executive Order.[2] We therefore

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[1] *See also* Executive Order No. 13201, 66 Fed. Reg. 11221 (Feb. 22, 2001) (requiring federal contractors to post notices informing employees of their NLRA right not to join a union); Executive Order No. 13203, 66 Fed. Reg. 11227 (Feb. 22, 2001) (dissolving intragovernmental councils on labor-management cooperation); and Executive Order No. 13204, 66 Fed. Reg. 11228 (Feb. 22, 2001) (rescinding an Executive Order that required new contractors providing services in federal buildings to give hiring preferences to employees who performed the same functions for the previous contractor).

[2] Section 1(a) of the Executive Order provides that "[t]o the extent permitted by law," no federal agency or construction manager acting on the agency's behalf shall, "in its bid specifications, project agreements, or other controlling documents" for a construction project "[r]equire or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction project(s)." Section 3 imposes the same prohibitions on recipients of federal grants and financial assistance and parties to cooperative agreements, and on construction managers acting on their behalf. The full text of Executive Order No. 13202 is reprinted at Pet. App. 74a.

begin by outlining the NLRA's policy insofar as it relates to PLAs, and then proceed to describe the Executive Order's counter-policy and its effects.

1. The NLRA, as amended, reflects Congress' recognition of the peculiarities of the contracting and employment systems in the construction industry, and Congress' specific intent to structure national labor policy to accommodate these peculiarities. The two salient points are these:

First, as this Court has written, the construction industry's labor relations pattern is different from that of the manufacturing and service industries in three respects: "the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry." *Building and Construction Trades Council v. Associated Builders and Contractors,* 507 U.S. 218, 231 (1993) ("*Boston Harbor*").

Second, the work on a construction job is rarely, if ever, let to a single entity that performs all of the work with and through its own employees. Rather, construction work is commonly let to multiple contractors and subcontractors, each performing part of the job. *See Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 657 (1982).

To accommodate these construction industry realities, the 1959 Congress, in amending the NLRA, enacted two provisions that apply only to construction. The first is § 8(f), which "explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements. Prehire agreements are collective bargaining agreements [that establish the terms and conditions of employment] prior to the hiring of any employees." *Boston Harbor,* 507 U.S. at 230. Second, the 1959 Congress passed an "amendment adding a proviso to subsection (e) [which]

permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site *unless they agree to become bound by the terms of that labor agreement.*" *Id.* (emphasis added).[3] Taken together, §§ 8(e) & (f) permit a construction manager/general contractor, retained by the construction project's owner, to manage the construction by bargaining collectively with construction industry unions to establish the terms and conditions that will apply for *all* work to be performed by the contractors and subcontractors on the project, *before the contractors and subcontractors have been selected, the employees have been hired and the work has been commenced.*

In enacting these construction industry provisions, Congress validated a long-standing practice whereby construction managers/general contractors retained by construction project owners negotiated master labor contracts establishing a uniform system of labor relations for large, complex construction projects—*i.e.,* of negotiating project labor agreements.[4] As described by the U.S. Department of Labor, the first PLAs were designed to

> meet[] the needs of massive projects such as the construction of the St. Lawrence Seaway or the Alaska Pipe Line, which last for several years, pose special

[3] Section 8(e) generally prohibits "hot cargo" agreements, *i.e.,* agreements between an employer and a union requiring the employer to refrain from doing business with a third party. The construction industry proviso—an exception to this general prohibition—allows construction industry parties to specify that work on a project will be contracted and subcontracted only to employers that agree to be bound by the prehire agreement. *Boston Harbor,* 507 U.S. at 230; *see Woelke & Romero,* 456 U.S. at 657.

[4] In fact, federal agency and federally assisted construction projects have been developed under PLAs since at least 1938. U.S. GENERAL ACCOUNTING OFFICE, PROJECT LABOR AGREEMENTS: THE EXTENT OF THEIR USE AND RELATED INFORMATION 4 (May, 1998).

> problems of manning and work rules, and involve huge sums of money, a consortium of several contractors, and a great deal of public interest and often public funds. Contractors on such projects, and their eventual owners, want continuity of production, more favorable treatment of costs . . . . than local agreements typically provide, uniform shift and other conditions for all trades, and the help of national union officials experienced in securing manpower and administering agreements on large projects. . . . For contractors and owners, one of the chief attractions of such agreements has been their recent inclusion of a clause promising no strikes for the duration of the project. [U.S. DEPT. OF LABOR, LABOR MANAGEMENT SERVICES ADMINISTRATION, THE BARGAINING STRUCTURE IN CONSTRUCTION: PROBLEMS AND PROSPECTS 14 (1980).]

By negotiating a PLA that governs the terms and conditions of employment for an entire project and binds all contractors and subcontractors that do any work on the site, the construction manager/general contractor provides for the efficiencies that are gained (i) by standardizing and tempering the trade-by-trade or contractor-by-contractor work rules, shift schedules, overtime practices and other labor relations policies that otherwise prevail in the locality; (ii) by adopting orderly and effective referral systems, that ensure a steady supply of qualified craft workers; and (iii) by guaranteeing that there will be no strikes or lockouts on the site for the duration of the project and establishing mechanisms to quickly resolve any employment disputes that may arise. *See* D.Q. MILLS, INDUSTRIAL RELATIONS AND MANPOWER IN CONSTRUCTION 40 (1972).

2. In the face of the foregoing, the Executive Order, in blanket terms, prohibits any construction manager retained by a federal agency or a recipient of federal assistance to manage a construction project from negotiating a project labor agreement binding on all the contractors and subcontractors

on the project. Executive Order No. 13202, §§ 1(a) and 3; Pet. App. 74a-75a.[5] While it does so by indirection, the Executive Order goes on to bar the negotiation and implementation of *enforceable* PLAs on federal or federally assisted construction projects by prohibiting federal agencies and recipients of federal assistance from including the PLA requirement in the project's bid specifications. *Id.* Public contracting laws—which generally call for competitive bidding and provide that the public construction project owner must maintain control over the bidding process—require that the bid specifications provide notice of all material conditions for working on the site. Thus, a public works project PLA can only be implemented in the manner intended—*i.e.*, as a project-wide collective bargaining agreement binding on all contractors/subcontractors on the job—if the public entity letting the contracts makes adherence to the PLA a condition in the bid specifications. Pet. App. 2a.

3. The *Boston Harbor* case provides an illustrative example of how the NLRA construction industry collective bargaining regime works and how the Executive Order's regime overrides the NLRA's. The Massachusetts Water Resources Authority ("MWRA"), under court order to clean up the polluted harbor, retained a project manager, Kaiser Engineers, Inc., to supervise the construction activity at the project. "Kaiser suggested to MWRA that Kaiser be permitted to negotiate an agreement with the [local building trades council] that would assure labor stability over the life of the project. . . . MWRA accepted Kaiser's suggestion, and Kaiser accordingly proceeded to negotiate" a PLA that established the employment terms for the project, including "a requirement that all contractors and subcontractors agree to

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[5] The miniscule exemption for a waiver of the Order's ban "in order to avert an imminent threat to public health or safety or to serve the national security," Executive Order No. 13202 § 5, Pet. App. 75a-76a, is so narrowly drawn as to be of no consequence.

be bound by the agreement." *Boston Harbor*, 507 U.S. at 221-22. Massachusetts law required the MWRA to administer the bidding process and to include all relevant contract terms "in the form of a bid specification." *Id.* at 221 and n.1. The MWRA accordingly included in the bid specifications for the project the requirement that all contractors and subcontractors abide by the PLA's terms. *Id.* at 222.

The Boston Harbor PLA was a "valid labor contract under §§ 8(e) and (f)." 507 U.S. at 230 ("[T]hose sections explicitly authorize this type of contract between a union [like a building trades council, of which building and construction employees are members,] and an employer like Kaiser, which is primarily engaged in the construction industry, covering employees engaged in that industry."). And this Court found that the MWRA's action, as "owner of [the] project," in "[enforcing] an otherwise lawful prehire collective bargaining agreement negotiated by private parties," *id.* at 220, was fully consistent with the NLRA, *id.* at 232-33. Had the Executive Order been in effect, however, it would have barred Kaiser, the project manager for the Boston Harbor project, from negotiating the PLA and would have barred the MWRA from including in the bid specification the condition that all successful bidders must abide by the PLA's terms.

4. To be sure, the Executive Order states that it does not "prohibit contractors or subcontractors from voluntarily entering into agreements" authorized by § 8(e). Executive Order No. 13202 § 1(c); Pet. App. 75a. But that statement does nothing to relax the Order's flat ban on the negotiation and implementation of PLAs on federal and federally assisted construction projects. First, as discussed, the point of a project-wide labor agreement is to enable the construction manager/general contractor responsible for the overall operation to make decisions, *in the planning stages for the project,* concerning labor costs, staffing plans, site coordination, and the like, and to provide for the

implementation of those decisions in contracting and subcontracting the work on the project. And, these agreements are intended to facilitate bidding, by providing the contractors and subcontractors seeking to work on the project with a solid basis for developing realistic bids. The "permission" § 1(c) of the Order grants contractors and subcontractors to devise and implement their own labor relations policies *after* the contracts are awarded and without any assistance from a construction manager, is not the equivalent of—nor does it even approximate—the permission set forth in NLRA §§8(e) and (f), to negotiate and implement PLAs. Second, § 1(c) of the Order does not modify in any way the Order's ban on including notice of a PLA in the project's bid specifications, and, as we have seen, absent such notice a PLA cannot be made binding on the project's contractors and subcontractors.

5. The Executive Order had an immediate impact on the petitioners in this case. The Building and Construction Trades Department ("BCTD"), a labor organization comprised of fourteen national building trades unions, and its local affiliates routinely negotiate PLAs with construction managers/general contractors for large and complex construction projects. Before the Executive Order issued, Parsons Constructors, Inc. ("PCI"), the construction manager retained by the State of Maryland, and the BCTD had negotiated a PLA for Maryland's portion of the Woodrow Wilson Memorial Bridge reconstruction project, a multi-year, multi-billion dollar project the States of Maryland and Virginia are conducting with federal financial backing. By early January 2001, the State had submitted the PLA to the Federal Highway Administration ("FHWA"), and was awaiting the Agency's approval to include it in the project's bid specifications.[6] Within days after the Executive Order

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[6] Under Maryland contracting law, the State was required to maintain control over contract awards, and both state law and FHWA regulations

issued, however, FHWA advised Maryland that the Executive Order prohibited the State from taking any action to implement the PLA. Faced with construction deadlines and financially unable to forego the federal funding, the State awarded the contracts for the next construction phase without including the PLA in its bid specifications. Pet. App. 20a.

At the same time, the City of Richmond was planning two urban renewal projects, with financial assistance from various federal agencies. The City Manager had assessed the City's needs and was prepared to recommend that the City Council authorize its construction manager to negotiate PLAs with the Contra Costa Building and Construction Trades Council ("BCTC") for the projects. When the Executive Order issued, however, the City Council concluded that the City could not afford to undertake these projects without federal assistance and voted not to proceed with an authorization for the negotiation of a PLA. Pet. App. 42a.

6. On April 26, 2001, the BCTD, the City of Richmond and the Contra Costa BCTC challenged the Executive Order in the U.S. District Court for the District of Columbia, in a suit brought pursuant to 28 U.S.C. § 1331. The District Court issued a preliminary injunction on August 13, 2001, prohibiting the Government from using the Executive Order to block Maryland from implementing the PLA on the Wilson Bridge; and on November 7, that court permanently enjoined enforcement of the Executive Order.

The District Court found that by "set[ting] a blanket rule [that] does not require government agencies to act on a project-by-project basis, as was the case in *Boston Harbor,*" the Executive Order had "broad policy implications . . . . The government is using the power of its purse to control and regulate the behavior of other market participants." Pet.

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required inclusion of material conditions in the bid specifications. MD. CODE ANN. STATE FIN. & PRAC. § 13-103; 23 C.F.R. § 635.112.

App. 68a-69a, citing *Boston Harbor,* 507 U.S. at 233. Accordingly, the Executive Order "is clearly a regulatory act rather than the government 'act[ing] just like a private contractor would act.'" Pet. App. 68a, quoting from *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1336 (D.C. Cir. 1996)(additional internal citations omitted). Following the teachings of *Chamber of Commerce*—in which the D.C. Circuit held that such a regulatory government procurement action addressed to labor relations matters must be tested against NLRA preemption principles to determine whether the action "unacceptabl[y] conflict[s]" with the labor relations policy established by Congress in the NLRA, 74 F.3d at 1333-34—the District Court ruled that the Executive Order improperly intrudes into the NLRA's exclusive regulatory field. Pet. App. 62a-66a.

The D.C. Circuit reversed. The Court of Appeals set a single criterion for differentiating regulatory procurement actions subject to preemption analysis from proprietary procurement actions not subject to such analysis—"[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory only when . . . it addresses employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." Pet. App. 13a (internal citations omitted). Applying that criterion, the D.C. Circuit held that the Executive Order constitutes proprietary action rather than regulatory action, and is therefore not subject to scrutiny under NLRA preemption principles.

REASONS FOR GRANTING THE WRIT

In a series of major federal statutes—including the National Labor Relations Act ("NLRA"), the Employee Retirement Income Security Act ("ERISA"), the Interstate Commerce Commission ("ICC") Termination Act of 1995, and the Telecommunications Act—Congress has established integrated statutory regimes that preempt other governmental

authorities—both Federal and State—from taking actions that conflict, or otherwise interfere, with Congress' regulatory scheme. And, under the proprietary/regulatory dichotomy articulated by this Court in *Wisconsin Dep't of Industry v. Gould,* 475 U.S. 282 (1986), and *Boston Harbor*, government procurement actions that are tantamount to regulation are subject to preemption on the same principles and to the same extent as other government regulatory actions, while proprietary government procurement actions are not subject to preemption.

Given the range and scope of these preemptive federal statutes in regulating the economy, and the range and scope of government procurement actions in the economy, the *Gould/Boston Harbor* dichotomy has generated a continuing flow of litigation on the question of which procurement actions are "regulatory" and which are "proprietary." And, that litigation has, in turn, generated a conflict in the Circuits.

In this case, the D.C. Circuit held that Executive Order No. 13202's blanket ban on the negotiation of PLAs by construction managers acting on behalf of construction owners, and construction unions on all federal and federally assisted construction projects "clearly constitutes proprietary action rather than regulation." Pet. App. 10a. Based on that holding, the Court of Appeals opined that there was no "need" to determine whether the Order "runs afoul of [the NLRA's preemption] principles." *Id.*

On this recurring question of what government procurement activity is properly characterized as "proprietary" and what is properly characterized as "regulatory"—and by extension, on the proper reading of this Court's *Gould* and *Boston Harbor* decisions—the D.C. Circuit's decision is in direct conflict with the Ninth Circuit's decision in *Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), and the Fifth Circuit's decision in *Cardinal Towing v. City of Bedford, Texas,* 180 F.3d 686 (5th Cir.

1999). In this regard, the D.C. Circuit's decision is also irreconcilable with the Seventh Circuit's understanding of the *Gould/Boston Harbor* proprietary/regulatory dichotomy in *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631 (7th Cir. 1996), and with that of the Second Circuit in *Sprint Spectrum v. Mills*, 283 F.3d 404 (2d Cir. 2002).

The D.C. Circuit's decision—and the resulting conflict in the Circuits—is of large significance to the proper effectuation of the uniform national labor policy stated in the NLRA, and as well, to the proper effectuation of the uniform regulatory policies Congress stated in such preemptive statutes as ERISA, the ICC Termination Act, and the Telecommunication Act. On the decision below—but not on the conflicting *Dillingham* and *Cardinal Towing* decisions—government procurement authorities have *carte blanche* to promulgate general rules that govern the conduct of private parties providing goods/services to the government while those parties are providing those goods/services, which conflict with the general regulatory rules stated in a preemptive federal statute. That is so:

- even though government action setting general rules of conduct for private economic actors on such matters as labor relations policy is characteristic of the government acting as a regulator, not the government acting as proprietor;
- even though there are numerous government regulatory enactments—such as the prevailing wage laws—that apply to the class of private parties providing the government with goods and services while these private parties are providing those goods and services to the government, and only to such private parties;
- even though private purchasers do not characteristically set such general rules of conduct for their suppliers;

- even though the D.C. Circuit's proprietary action concept opens the way for government procurement authorities to promulgate general rules of conduct for suppliers, which conflict with the regulatory rules Congress has enacted, and which will control in the public works construction sector of the economy—which accounts for approximately 20% of new construction in this country—and indeed, in the overall government procurement sector—which accounts for approximately 17% of the gross domestic product. STATISTICAL ABSTRACT OF THE UNITED STATES 591, 417, Charts No. 929 and 640 (2000 Ed.).

To put these general points in concrete terms, the D.C. Circuit's decision recognizes an Executive proprietary procurement power to override the NLRA with regard to the negotiation by construction managers and construction unions of PLAs on federal and federally financially assisted construction projects. And, there is no escaping the logic that the D.C. Circuit's theory equally recognizes a state procurement power (and a local power) to override the NLRA on state and state funded (and on local) construction projects—and to do so *either* by barring the negotiation of PLAs (as the Executive Order does) *or* by mandating the negotiation of PLAs.

At the very least, then, the D.C. Circuit's decision enables procurement authorities to balkanize what Congress intended to be the uniform NLRA regulation of construction industry labor relations, so that the private parties on federal and federally assisted construction projects are governed by an Executive Order on PLAs, while those on state and state assisted construction projects (and on local projects) are governed by a myriad of state (and local) orders on PLAs. And, of course, the D.C. Circuit's decision does not rest on any theory that would limit the range of general labor relations rules that government procurement authorities are entitled to establish to rules on the negotiation of PLAs. To

the contrary, on the D.C. Circuit's theory, an executive order generally establishing the labor relations policy for private entities while those private entities are providing the government with goods and services—and covering the same matters covered by the NLRA but in a different way—would be "clearly proprietary" government procurement action *not* subject to NLRA preemption.

I. THE CONFLICT IN THE CIRCUITS

(a) The D.C. Circuit concluded its discussion of whether Executive Order No. 13202 is "proprietary" government procurement action that is not subject to NLRA preemption principles or regulatory action that is subject to those principles by stating its holding in the following terms:

> A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it "addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." 507 U.S. at 228-229. Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the government." Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory." [Pet. App. 13a.]

We hasten to add that the *Boston Harbor* Court did not state at 507 U.S. 228-29—or anywhere else in its opinion—that *only* government procurement action addressed to employer conduct unrelated to the employer's performance of its contractual obligations to the government is regulatory conduct. Nor did the *Boston Harbor* Court state that *all* government procurement action addressed to the employer's conduct related to its performance of contractual obligations to the government is proprietary action. What the Court

stated at 507 U.S. 228-29, in discussing its *Gould* decision, is that government procurement action "addressed to employer conduct [that violates a federal statutory norm] unrelated to the employer's performance of contractual obligations to the [government]" in order "to deter [such federal statutory] violations" is a clear example of government procurement action that is "tantamount to regulation." And, *Boston Harbor* concluded its discussion of *Gould* in a manner that belies the D.C. Circuit's expansive concept of proprietary government procurement action, by limiting that concept to government action "as a market participant with *no* interest in setting policy." 507 U.S. at 229 (emphasis added).

(b) Not surprisingly then, the D.C. Circuit's proprietary/regulatory distinction ruling—and its reading of *Boston Harbor*—is in conflict with that of other circuits.

Dillingham Const. N.A. Inc. v. County of Sonoma, *supra*, presented the Ninth Circuit with a proprietary/regulatory dichotomy issue indistinguishable from the one presented in the instant case. In *Dillingham*, the "State of California argue[d] that the apprenticeship prevailing wage law"—which requires contractors and subcontractors working on state construction projects to pay prevailing wages to employees in apprenticeship programs that have not received State approval but allows such contractors to pay lower wages to apprentices enrolled in State-approved programs—"is immune from NLRA preemption because the apprenticeship prevailing wage law results from the State functioning as a mere proprietor or market participant rather than as a regulator." 190 F.3d at 1037-38.

Under the D. C. Circuit's ruling here, that argument would carry the day: the California law "addresse[d] employer [labor relations] conduct []related to the employer's performance of contractual obligations to the [State,] . . . extend[ed] only to work on [State] projects . . . [and did] not address [apprentice pay] on projects unrelated to those in

which the [State] has a proprietary interest . . . ." Pet. App. 13a. But the Ninth Circuit concluded that the "State's argument is without merit:"

> The State did not merely create apprenticeship standards in its contract with Dillingham nor were the apprenticeship standards in this case created based upon unique needs that the detention facility project presented. The apprentice prevailing wage law applies uniformly to all public works contracts executed in the State of California and is a mechanism through which the State regulates apprenticeship programs and the employment of apprentices on public works projects.
>
> * * *
>
> In contrast to [*Boston Harbor*] and as noted above, the State in this case did not establish the apprentice prevailing wage law specifically for the detention facility project and the State was not motivated by management concerns when it adopted the apprentice prevailing wage law. The State's purpose in enacting and enforcing the apprentice prevailing wage law was to regulate apprenticeship programs and wages paid on public works projects. The apprentice prevailing wage law is state regulation and is subject to NLRA preemption if it falls under one of the two NLRA preemption doctrines. [190 F.3d at 1038.]

Simply stated, on the Ninth Circuit's reading of *Boston Harbor*, but not on the D.C. Circuit's, a government procurement action that sets an across-the-board labor relations rule that governs employers and employees while they are doing work on government construction projects is a regulatory action subject to NLRA preemption, not a proprietary action that is not subject to preemption.

While *Cardinal Towing v. City of Bedford, Texas*, *supra*, arose in a markedly different statutory context from the instant case and *Dillingham*, the Fifth Circuit's reading of the

Boston Harbor proprietary/regulatory dichotomy there, like the Ninth Circuit's in *Dillingham*, is in conflict with that of the D.C. Circuit.

In the ICC Termination Act, Congress broadly preempted state and local authority over motor carriers that transport property by providing that "[a] State . . . may not enact or enforce any law, regulation, or other provision having the force or effect of law relating to a price, route, or service of a motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c). In *Cardinal Towing*, the question was whether the City of Bedford's bid specification for its police department's towing contract, requiring the bidder to guarantee a short response time and access to a heavy tow truck, and an ordinance directing that the successful bidder do all such towing, were state actions preempted by the ICC Termination Act. 180 F.3d at 689-90.

The Fifth Circuit noted that the preemption provision in the ICC Termination Act is almost identical to ERISA's preemption provision in expressly preempting state "laws" and defining "state law" as an action "having the force and effect of law;" recognized that courts have applied the *Gould/Boston Harbor* proprietary/regulatory dichotomy to determine whether a government procurement action is subject to ERISA preemption, citing *Associated Gen. Contractors of Amer., San Diego Chap. v. Metropolitan Dist. of Southern California*, 159 F.3d 1178, 1183 (9th Cir. 1998); and adopted that approach to determine whether Bedford's bid specification and ordinance were procurement actions subject to ICC Termination Act preemption. *Cardinal Towing*, 180 F.3d at 695.

The Fifth Circuit therefore surveyed the *Gould* and *Boston Harbor* decisions and the lower court decisions applying the *Gould/Boston Harbor* proprietary/regulatory dichotomy. And, on the basis of that survey, the *Cardinal Towing* court concluded that "[f]ollowing the logic of *Gould*, courts have found preemption when government entities seek to advance

general societal goals rather than narrow proprietary interests through the use of their contracting power," 180 F.3d at 692; and that following the logic of *Boston Harbor*, "courts have similarly shielded contract specifications from preemption when they applied to a single discreet [sic] contract and were designed to insure efficient performance rather than advance abstract policy goals," *id.* at 693.

Drawing on that review, the Fifth Circuit then synthesized the lessons of *Gould* and *Boston Harbor* into a two-part test:

> In distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power, the key under *Boston Harbor* is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out. [*Id.*]

In this regard, *Cardinal Towing* cautions that given "the ever present temptation to leverage the spending power" to "intrude on [the] congressional design" embodied in a preemptive federal regulatory statute, only "archetypical market behavior" by the government is properly characterized as proprietary, *id.* at 694 n. 2, *viz.*, only behavior "designed to insure efficient performance rather than advance abstract policy goals," *id.* at 693. *See also Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001) (following *Cardinal Towing* and finding that the setting of towing requirements for a city police department constituted proprietary action that was not subject to preemption under the ICC Termination Act);

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000) (same).

In the decision below, the D.C. Circuit treated as an irrelevancy what the Fifth Circuit described as a "key" question—whether the government procurement action is action that "encourage[s] a general policy" rather than action that is "address[ed to] a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693. On the D.C. Circuit's theory, so long as the government procurement authority is imposing its general policy rule on private entities only when the entities are doing business with the government and not when the entities are doing business with third parties, the government action is proprietary. And, as the instant case makes plain, the Fifth Circuit's proprietary/regulatory test and the D.C. Circuit's test are not merely different—they are different in an outcome determinative way.

(c) The confusion in the circuit court law is deepened by court of appeals decisions that hold that government procurement action is proprietary action, but do so on a far narrower concept of proprietary action than the D.C. Circuit's conception. In *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631, 634-35 (7th Cir. 1996), the Seventh Circuit found that Illinois' action in including in the bid specifications for a particular project a requirement that successful bidders adhere to a PLA constituted proprietary action. In so finding, the court emphasized that the State acted to insure efficient performance on a particular project, and without any intent to set policy on the negotiation or implementation of PLAs. As the court put it, "Illinois has not enacted a statute. The [State] Authority has not passed a general rule. The [State] Authority was contracting for services on a specific contract." Since Illinois' action on its face "extended only to work on behalf of the government," Pet. App. 13a, on the D.C. Circuit's theory, the factors the Seventh Circuit took into account were not necessary—or even relevant—to the result. *See also Associated Gen.*

Contractors of Amer., 159 F.3d at 1182 (in finding that a public entity's bid specification requiring adherence to a PLA was proprietary conduct, and therefore not preempted by ERISA, the Ninth Circuit emphasized that, "[t]he bid specification applies to a discrete project. It is not a generally applicable law or regulation. It does not apply to every project done in the county.").

By the same token, the Second Circuit, in a case involving a preemption provision in the Telecommunications Act, 47 U.S.C. §332(c)(7)(B)(iv), held that a school board's inclusion of a condition in a lease for the placement of a cellular communications tower, restricting the density of radio emissions from the tower to a level below the maximum set by federal standards, constituted proprietary conduct immune from preemption. In so holding, the Second Circuit noted, "[t]here is no state or local statute or ordinance or guideline . . . at issue here. The School District entered into a single lease agreement with respect to a single building. The District did not purport to punish [the company] for any past conduct or to impose any condition with respect to any [company] tower other than that to be located on the High School." *Sprint Spectrum v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002). S*ee also Chamber of Commerce v. Lockyer*, No. SA CV 02-0377 (C.D. Calif., Sept. 18, 2002) (holding that the D.C. Circuit decision in this case was not controlling, and that a California statute prohibiting the use of state funds to deter or promote union organizing was preempted regulatory conduct).

In sum, a proper understanding—and a proper application—of the *Gould/Boston Harbor* proprietary/regulatory dichotomy by the lower courts is critical to maintaining the integrity of Congress' exclusive statutory regulatory scheme and to doing so in a manner that permits government procurement authorities to interact with private parties in the marketplace. But the circuit court law on the proprietary/regulatory dichotomy is in conflict, and as evidenced by the

D.C. Circuit's decision here, one of the conflicting views permits government procurement authorities to act as independent policymakers, imposing general rules of conduct on suppliers doing business with the government that displace the rules Congress has enacted in an exclusive regulatory statute. The Court's intervention to settle this conflict and to elaborate the proprietary/regulatory dichotomy so as to guide the lower courts in deciding the broad range of cases that turn on the dichotomy is both warranted and needed.

II. THE D.C. CIRCUIT'S DECISION IS INCONSISTENT WITH *BOSTON HARBOR*'S REASONING AND HOLDING

The *Boston Harbor* Court began its discussion of the proprietary/regulatory dichotomy by noting two baseline propositions. *First,* "[o]ur [NLRA preemption] decisions . . . support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity [such as proprietary activity] that affects labor." 507 U.S. at 227 (emphasis in original). And *second*, government procurement actions that are tantamount to regulation are regulatory and subject to the NLRA preemption principles: "In *Gould*, we rejected the argument that the State was acting as a proprietor rather than regulator for purposes of *Garmon* pre-emption when the State refused to do business with persons who had violated the NLRA three times within five years." *Id.* at 228.

At that juncture, the Court confronted—and rejected—the argument of the plaintiffs/respondents there—which rested on a "passage from *Gould*"—that the "State as proprietor is subject to the same preemption limitations as the State as regulator." *Id.* The *Gould* passage in question states in its most pertinent part:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But

> government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The NLRA . . . treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play. [475 U.S. at 290.]

This argument was unsound, said the Court, because it failed to recognize a basic conceptual distinction that applies in both the private sphere and the governmental sphere:

> The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. The private actors under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor. [507 U.S. at 229.]

Once this conceptual distinction between purchaser actions as a regulator and purchaser actions as a typical proprietor is appreciated, two conclusions follow. First, "[t]he fact that a private actor may 'regulate' does not mean, of course, that a private actor may be 'pre-empted' by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may 'regulate' as they please, as long as their conduct does not violate the law." *Id.* And second,

> As *Gould* makes clear, however, states have a qualitatively different role to play from private parties. When the State acts as a regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the *State acts as a market participant with no interest in setting policy.*

> In *Gould*, we did not address fully the implications of these distinctions. We left open the question whether a State may act without offending the pre-emption principles of the NLRA when it *acts as a proprietor and its acts therefore are not "tantamount to regulation" or policymaking*. As explained more fully below, we now answer this question in the affirmative. [*Id.* at 229-30 (emphasis added).]

In essence, then, a purchaser participating in the market who demands that its suppliers conduct their affairs in a specified manner (i) acts as a "regulator" when its demand is based on the purchaser's "policy concerns"—in this context, its labor policy concerns—and is to further its interest in effectuating its policy preferences; and (ii) acts as a "typical proprietor" when its demand is based solely on its "profit motive" interest—its interest in purchasing a good or service efficiently and effectively—and not at all on its regulatory interest "in setting policy." The most essential point is that when government procurement action "set[s] policy," it has a hallmark of government regulatory action, and that when government procurement action "set[s] policy" in an area where Congress has set policy through an exclusive regulatory statute, it has a hallmark of government action that requires preemption analysis and review—and that cannot be categorically immunized from such analysis and review.

Thus, the MWRA's action in *Boston Harbor* as a "purchas[er of] contracting services," 507 U.S. at 231, in demanding that contractors and subcontractors working on the Boston Harbor construction project abide by the PLA negotiated by the project construction manager and the building trades council, was that of a typical proprietor in that it (i) was "in pursuit of [the State's] purely proprietary interests" in "ensur[ing] an efficient project that would be completed as quickly and effectively as possible at the lowest cost"; (ii) was analogous to permitted "private [purchaser] conduct"; (iii) was "specifically tailored" to achieving the

State's purely proprietary interest "on one particular job;" and (iv) was not in any way an attempt to establish a general policy on the negotiation of PLAs binding on contractors and subcontractors. *Id.* at 231-32. The MWRA's procurement action was therefore proprietary and not "government regulation . . . subject to NLRA preemption." *Id.* at 232.

The multiple errors in the D.C. Circuit's reading of *Boston Harbor* are patent. First, as we noted earlier and contrary to the D.C. Circuit's restatement of *Boston Harbor*, this Court neither stated nor intimated that *only* government procurement actions imposing requirements "unrelated to the employer's performance of contractual obligations to the [Government]," 507 U.S. at 229, are regulatory, or that *all* government procurement actions imposing requirements "[]related to employer's performance of [such] contractual obligations" are proprietary.

Second, the D.C. Circuit's theory distorts beyond recognition the essential point of the *Boston Harbor* analysis—that government procurement action is proprietary when the government "acts as a market participant with no interest in setting policy." 507 U.S. at 229. On the decision below, government action is proprietary when the government acts as a market participant *with an interest in setting policy*—for example, labor relations policy—for the class of private entities providing goods/services for the government while they are providing those goods/services.

That is contrary to what *Boston Harbor* says and to the basic understanding of the government as regulator and of government regulation. It runs past the point that Congress—acting in what is plainly a "characteristically . . . governmental . . . role," *Boston Harbor,* 507 U.S. at 229—routinely enacts regulatory measures that impose conditions *only* on the class of private parties providing goods/services to the government, and *only* while they are providing those goods/services. It is beyond question, as the Ninth Circuit

recognized in *Dillingham*, that such measures—which "extend[] only to work on projects funded by the Government," Pet. App. 13a—are government "regulations."

The Fifth Circuit, in marked contrast to the D.C. Circuit, took full account of *Boston Harbor* in defining proprietary government procurement action immune from preemption as action "so in keeping with the ordinary [market] behavior of a private party" and "so narrowly focused" on the government's "own interest in its efficient procurement of needed goods and services" as to rule out any inference that the government is acting on a "regulatory impulse" to "encourage a general policy." *Cardinal Towing,* 180 F.3d at 693. As the Fifth Circuit noted, testing the government's procurement actions against these indicia of "archetypical market behavior" is an important check on "the ever present temptation to leverage the spending power and thus intrude on a congressional design" set out in a preemptive regulatory statute. *Cardinal Towing,* 180 F.3d at 694 n. 2.

The Executive Order does not meet the *Boston Harbor* definition of proprietary government procurement action. It is *not* specifically tailored to a particular contract, or even to a particular type of construction project. Instead, it applies to *all* federal and federally assisted construction projects—whether court houses, bridges, dams, highways, urban renewal projects—wherever the project is located, whatever the labor relations situation in the area, however much money the federal government is providing, and without regard to any assessment of whether a PLA would further or retard the government's interest, as a purchaser, in having the project constructed as effectively and efficiently as possible, at the lowest cost. Imposing such a general labor relations rule on all private parties providing construction services to the government and to entities receiving financial assistance from the government simply cannot be considered the action of a "market participant with no interest in setting policy." *Id.* at 229.

The D.C. Circuit's theory undermines the very point of the *Gould/Boston Harbor* proprietary/regulatory dichotomy, which is to insulate from unwarranted preemption attacks government procurement action that is focused on the government's proprietary interests and is, in that critical sense, typically proprietary. For the D.C. Circuit extends the proprietary action concept so far that it insulates from preemption scrutiny policymaking in areas in which Congress has already enacted legislative policy.

In sum, this Court should grant *certiorari* in this case to correct the patent errors in the D.C. Circuit's decision and, in so doing, to restore the proprietary government procurement action concept to the narrow bounds the *Boston Harbor* Court envisaged.

III. THE EXECUTIVE ORDER IS INVALID UNDER NLRA PREEMPTION PRINCIPLES

Our two-fold position in this case is (i) that Executive Order No. 13202 is regulatory government procurement action and not proprietary action; and (ii) that the Executive Order is invalid as regulatory action that improperly encroaches into the field exclusively regulated by the NLRA.

In the first Question Presented, and for the reasons just developed, we request this Court to consider the proprietary/ regulatory dichotomy issue this case raises and that the Court of Appeals decided erroneously.

In the second Question Presented, we go on to request the Court to consider the NLRA preemption issue this case also raises and that the Court of Appeals did not reach. Against that procedural background, we limit ourselves to a brief statement in support of that request.

The second Question Presented raises a pure question of law. That issue is important both in its own particular terms and in general terms. The Executive Order's labor relations rule, barring the negotiation of PLAs, overrides one of the

most critical and sensitive of the NLRA's labor relations rules. This Court's decision on whether the Executive can take such a procurement action in the face of a federal statute, like the NLRA, that Congress enacted to occupy a regulatory field will not only determine whether the Executive has the authority to promulgate the particular rule at issue here, but given the nature of the case, will most certainly illuminate the greater question of whether the Executive has the authority to promulgate rules that override rules Congress has established as part of an exclusive statutory regulatory regime.

The legal issues raised by the two Questions Presented are so closely related that it would, we believe, serve the interest in the proper development of the law for the parties to brief and argue both questions to the Court at the same time and in the same proceeding. We therefore conclude by summarizing our argument for the proposition that Executive Order No. 13202 is a procurement action that improperly intrudes into the NLRA's exclusive regulatory territory and is invalid on that basis.

(a) The Executive Order rests on the Federal Property and Administrative Services Act ("the Procurement Act") and other, unspecified federal funding statutes. *See* Pet. App. 78a. As the D.C. Circuit has stated, the Procurement Act—and, we submit, these other funding statutes—are "designed to address . . . concerns quite different from the more focused question of the appropriate balance of power between management and labor in collective bargaining" that Congress addressed through the NLRA. *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1333 (D.C. Cir. 1996). Equally to the point, nothing in the Procurement Act, or those funding statutes, gives the slightest basis for the proposition that Congress has granted the Executive procurement authority to promulgate labor relations rules that override the NLRA's labor relations rules. *Id.*

To the contrary, because an Executive Order may only "be enforced within the framework of Congress' legislative will," *United States v. Trucking Management, Inc.*, 662 F.2d 36, 42 (D.C. Cir. 1981), the President's authority to marshal his procurement authority to fashion his own labor relations regime is necessarily limited by the "the fixed intent of Congress [stated in the NLRA] and the policy behind that intent." *United States v. East Texas Motor Freight,* 564 F.2d 179, 185 (5th Cir. 1977). Accordingly, as the D.C. Circuit explained in *Chamber of Commerce*, when—as in this case—there

> is some tension between the President's Executive Order and the NLRA[, . . . t]o determine whether that tension constitutes unacceptable conflict [that makes the Order invalid,] we look to the extensive body of Supreme Court cases that mark out the boundaries of the field [Congress] occupied by the NLRA. Since the progenitors of these cases originally arose in the context of state actions that were thought to interfere with the federal statute, they are referred to collectively as establishing the NLRA "pre-emption doctrine." The principles developed, however, have been applied equally to federal governmental behavior that is thought similarly to encroach into the NLRA's regulatory territory. [74 F.3d at 1333-34.]

(b) In "mark[ing] out the boundaries of the field [Congress] occupied by the NLRA," *Chamber of Commerce*, 74 F.3d at 1333, this Court has developed "two distinct NLRA pre-emption principles," *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 748 (1985): *"Machinists* preemption," which prohibits government regulation of matters that Congress intended to leave "to be controlled by the free play of economic forces," *see Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140 (1976) (citation omitted); and "*Garmon* preemption," which forbids government regulation of activities that are arguably

subject to NLRA §§ 7 or 8, *see San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959). As the District Court found in this case, Pet. App. 62a-66a, Executive Order No. 13202 runs afoul of both of these NLRA preemption principles.

The *Machinists* preemption principle reflects this Court's recognition that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488 (1960). The Executive Order is in the most direct conflict with this principle imaginable: whereas the NLRA explicitly authorizes construction managers and construction unions to freely negotiate PLAs, the Executive Order negates that explicit authorization by prohibiting the negotiation of such collective bargaining agreements.

The Executive Order equally offends *Garmon* preemption principles. In order to prevent conflict with Congress' "complex and interrelated federal scheme of law, remedy and administration," *Garmon,* 359 U.S. at 243, *Garmon* preemption forbids government regulation of activities that are "arguably subject to § 7 or § 8 of the [NLRA]," *id.* at 245. Congress enacted § 8(e) expressly to preserve to construction unions and construction employers the right, through a collectively bargained prehire agreement, to limit contracting and subcontracting on a construction site to those firms that agree to adhere to their bargaining agreement. *Woelke & Romero Framing,* 456 U.S. at 652-54. The Executive Order directly repudiates the "legislative goals that animated the passage of the §§ 8(e) and (f) exceptions for the construction industry," *Boston Harbor,* 507 U.S. at 230, by barring construction managers and construction unions from negotiating, and project owners from implementing, prehire agreements with clauses authorized by § 8(e) on any construction site receiving federal funds. Indeed, as dis-

cussed earlier, the Executive Order would have prohibited Kaiser and the local building trades council from negotiating, and the MWRA from implementing through its bid specifications, the PLA for the Boston Harbor cleanup—an agreement this Court recognized as a "valid labor contract under §§ 8(e) and (f)." *Id.* at 230.

In short, in this procurement action, the Executive has crossed the "boundaries of the field occupied by the NLRA," *Chamber of Commerce,* 74 F.3d at 1333, boundaries this Court has defined through its development of NLRA preemption principles. This Court should accordingly grant *certiorari* in this case, not only to clarify the meaning of the *Gould/Boston Harbor* proprietary/regulatory dichotomy, but to reinforce the preemption principles that deny the Executive the authority to "encroach into the [NLRA] regulatory territory." *Id.* at 1334.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5436

BUILDING AND CONSTRUCTION TRADES DEPARTMENT,
AFL-CIO, *et al.*,
Appellees,

v.

JOE ALLBAUGH, Director,
Federal Emergency Management Agency, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Columbia
(No. 01cv00902)

Argued May 10, 2002 Decided July 12, 2002

Opinion for the Court filed by Chief Judge Ginsburg.

Before: GINSBURG, *Chief Judge*, and RANDOLPH and TATEL, *Circuit Judges*.

Ginsburg, Chief Judge: Executive Order No. 13,202 provides that, to the extent permitted by law, no federal agency, and no entity that receives federal assistance for a construction project, may either require bidders or contractors to enter, or prohibit them from entering, into a project labor agreement (PLA). The plaintiffs—the Building and Construction Trades Department of the AFL-CIO (BCTD), the Contra Costa Building and Construction Trades Council (BCTC), and the City of Richmond, California—brought this

suit to challenge the validity of the Executive Order. The district court held the Executive Order invalid and enjoined its enforcement.

We hold that the President had authority under Article II of the Constitution of the United States to issue Executive Order No. 13,202, and that the Executive Order is not preempted by the National Labor Relations Act. Therefore, we reverse the judgment of the district court and vacate the injunction.

I. Background

A PLA is a multi-employer, multi-union pre-hire agreement designed to systemize labor relations at a construction site. It typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project; and that wages, hours, and other terms of employment be coordinated or standardized pursuant to the PLA across the many different unions and companies working on the project. The implementation of a PLA on a project underwritten by the Government almost always is accomplished by making agreement to the PLA a bid specification, thereby allowing the contracting authority to ensure that firms at every level—from the general contractor to the lowest level of subcontractor—comply with the terms of the PLA.

President George W. Bush issued Executive Order No. 13,202 on February 17, 2001, establishing the policy of the Government with regard to the use of PLAs in federal and federally funded construction contracts. *See* Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, 66 Fed. Reg. 11,225 (Feb. 22, 2001) (Executive Order). The Executive Order provides that the Government will neither require nor prohibit

the use of a PLA on any federal or federally funded construction project. Section 1(a) provides that, "[t]o the extent permitted by law," no federal agency or construction manager acting on its behalf shall "in its bid specifications, project agreements, or other controlling documents" for a construction project "[r]equire or prohibit bidders, offerors, contractors, or sub-contractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related project(s)." Section 3 applies the same prohibition to "any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects." The Executive Order makes clear that it does not prohibit a contractor or a subcontractor from entering into a PLA, *see id.* § 1(c); it merely prevents the contracting authority from either requiring or forbidding the use of a PLA for a project. The result in practice is to leave to the contractors working on a project the choice whether to enter into, and to require their subcontractors to enter into, a PLA, presumably depending upon whether it is likely to increase or to decrease their costs. *See, e.g.*, United States General Accounting Office, Project Labor Agreements, The Extent of Their Use and Related Information, GAO/GGD-98-82 (May 1998) 9 (describing instructions for bidders issued by Department of Labor allowing, but not requiring, "a responsive bidder [to] have a Project Labor Agreement (PLA) with its contractors" because a "PLA is one possible method of meeting th[e] goal" of ensuring good labor relations).

The plaintiffs brought suit in the district court to enjoin enforcement of the Executive Order, naming as defendants the Director of the Federal Emergency Management Agency, the Secretary of Housing and Urban Development, the Secretary of Transportation, and the members of the Federal Acquisition Regulatory Council. The BCTD, which consists of 14 national labor organizations representing workers in the construction industry, averred that it and its affiliates had

entered into and intended to negotiate many PLAs, the future availability of which would be affected directly by the Executive Order. The City of Richmond alleged that the Executive Order prevented it from requiring the use of PLAs on several federally funded construction contracts lest it lose its access to federal funds. The BCTC, which consists of 27 local labor unions representing construction workers in Contra Costa County, California, claimed in turn that but for the Executive Order it would negotiate PLAs with respect to work on federally funded projects put out for bid by the City of Richmond.

One of the projects for which the BCTD had negotiated a PLA was the Woodrow Wilson Bridge Construction Project, the purpose of which is to replace a drawbridge over the Potomac River. The Congress, after transferring ownership of the existing bridge to an interstate authority established by the District of Columbia, the State of Maryland, and the Commonwealth of Virginia, appropriated more than $1.5 billion for the project. *See* Woodrow Wilson Memorial Bridge Authority Act of 1995, Pub. L. No. 104-59, tit. IV, §§ 405, 410, 109 Stat. 568, 629, 633-34 (1995). Maryland took responsibility for building the structures crossing the Potomac River and the highways and interchanges on the Maryland side, and Virginia agreed to build the highways and interchanges on the Virginia side of the River. Before the President issued Executive Order No. 13,202 affiliates of the BCTD and the construction manager for the Maryland State Highway Administration entered into an agreement to set terms for the construction of Maryland's share of the project.

The agreement provided that Maryland would incorporate a PLA into its bid specifications and that the successful bidder for the project would be bound by the PLA regardless whether the contractor's employees were members of a union. As required by federal regulations, *see* 23 C.F.R. §§ 630.205(e), 635.104(a), 635.112(a), Maryland submitted the bid specifications to the Federal Highway Administration

(FHWA) for approval, but the FHWA rejected them because the newly issued Executive Order prohibited the State from requiring adherence to a PLA. Maryland later awarded the contract without requiring that the awardee enter into a PLA, which left the BCTD no role in the project.

Upon application of the BCTD, the district court issued a preliminary injunction "prohibiting the defendants from enforcing the Executive Order against the Wilson Bridge PLA." *Bldg. & Constr. Trades Dep't v. Allbaugh*, 172 F. Supp. 2d 67, 79 (2001). The court held that the Executive Order conflicts with the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and that without an injunction the BCTD would suffer irreparable harm because "before the Executive Order was put in place . . . [the] BCTD had negotiated an agreement, binding on Maryland, and Maryland was using its best efforts to implement it," 172 F. Supp. 2d at 79.

A few weeks later the district court issued a permanent injunction against enforcement of the Executive Order. The court held first that, pursuant to the reasoning of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the President could not impose the conditions in § 3 of the Executive Order upon the administration of federal funds without the express authorization of the Congress, *see Bldg. & Constr. Trades Dep't v. Allbaugh*, 172 F. Supp. 2d 138, 160 (2001), and that neither the Federal Property and Administrative Services Act, 40 U.S.C. § 471 *et seq.* (Procurement Act), nor any other statute authorizes the President to do so, *see id.* at 162. The district court next concluded that the Executive Order was preempted in its entirety by the NLRA because the Executive Order would abridge rights granted in § 8 of the Act to employers in the construction industry and would "alter the delicate balance of bargaining and economic power that the NLRA establishes." *See id.* at 167, 169 (*quoting Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996)).

II. Analysis

The Government appeals, contending that under Article II of the Constitution the President has authority to impose the conditions in § 3 of the Executive Order, and that the Executive Order is a proprietary rather than a regulatory act and therefore not subject to preemption by the NLRA. We address these questions of law de novo. *See Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000).

A. The Constitution and the Executive Order

The President's authority to act "must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585. In this case the district court assumed without deciding (because the plaintiffs had not argued to the contrary) that § 1 of the Executive Order, which section "involves contracting by federal agencies, . . . is arguably authorized by the Procurement Act," 172 F. Supp. 2d at 159 & n.9, but the court went on to "invalidate § 3 of EO 13202 as an action beyond the scope of the President's authority," *id.* at 162. The Government contends on appeal that in so ruling, "the district court fundamentally misunderstood the President's authority as head of the executive branch." The first question before us, therefore, is whether the President had constitutional authority to issue § 3 of the Executive Order, which section applies to "any agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects."

Article II, § 1 of the Constitution provides that the "executive Power shall be vested in a President of the United States of America." As the Government observes, the President's power necessarily encompasses "general administrative control of those executing the laws," *Myers v. United States*, 272 U.S. 52, 164 (1926), throughout the Executive Branch of government, of which he is the head. The authority of the President is not without limits, of course: "the President's

power [under Article II, § 3] to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587. His faithful execution of the laws enacted by the Congress, however, ordinarily allows and frequently requires the President to provide guidance and supervision to his subordinates. As we previously have had occasion to observe:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the law which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Sierra Club v. Costle, 657 F.2d 298, 406 n.524 (D.C. Cir. 1981). Those officers are duty-bound to give effect to the policies embodied in the President's direction, to the extent allowed by the law. *See* The Federalist No. 72, at 463 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) ("The persons, therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate . . . and ought to be subject to his superintendence").

Section 3 of Executive Order No. 13,202 is such an exercise of the President's supervisory authority over the Executive Branch. In the Executive Order, the President directs his subordinates how to proceed in administering federally funded projects, but only "[t]o the extent permitted by law." Thus, if an executive agency, such as the FEMA, may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law.

The district court's comparison of Executive Order No. 13,202 to the executive order by which President Truman purported to seize privately owned steel mills, and which the Supreme Court declared unlawful in Youngstown, is misplaced because the present Executive Order is not self-executing. As the Government says, the question in the earlier case was whether the President had constitutional authority to seize the mills and not, as here, whether he could direct Executive Branch officials in their implementation of statutory authority. Indeed, had President Truman merely instructed the Secretary of Commerce to secure the Government's access to steel "[t]o the extent permitted by law," Youngstown would have been a rather mundane dispute over whether the Secretary had statutory authority to act as he did.

The plaintiffs raise the prospect that, notwithstanding the President's instruction that the Executive Order be applied only "[t]o the extent permitted by law," a particular agency may try to give effect to the Executive Order when to do so is inconsistent with the relevant funding statute. We express no opinion upon whether this may come to pass. The mere possibility that some agency might make a legally suspect decision to award a contract or to deny funding for a project does not justify an injunction against enforcement of a policy that, so far as the present record reveals, is above suspicion in the ordinary course of administration. *See Reno v. Flores*, 507 U.S. 292, 301 (1993) (to prevail in facial attack, complainant must "establish that no set of circumstances exists under which the [regulation] would be valid") (brackets in original). In the event that an agency does contravene the law in a particular instance, an aggrieved party may seek redress through any of the procedures ordinarily available to it: a bid protest, a motion for administrative reconsideration, or an action in the district court challenging that specific decision.

Nonetheless, the plaintiffs complain that it is "untenable to require each federal grantee or other potential party to a PLA

to challenge a threatened denial of funds based on the Executive Order" because "projects are planned and conducted on tight and critical timeframes." That concern, however, provides us with no warrant to relieve the plaintiffs of their burden in this facial challenge to show that § 3 of the Order is without any valid application. *See Flores*, 507 U.S. at 301. Nor is there reason to be concerned for "each federal grantee"; a single judicial determination that an agency lacks authority to implement the Executive Order in its administration of a particular statute is likely to settle any questions about the application of the Executive Order to later grants of federal funds pursuant to that statute. Insofar as the plaintiffs are concerned that "there is rarely time to litigate an agency's rejection of a bid specification, or to challenge a threat that funding will be withheld," the Government correctly points out that the plaintiffs "offer no reason to think that the usual mechanisms for seeking expedited review would be inadequate" to provide redress where appropriate. *See, e.g.*, 4 C.F.R. § 21.10 (2002) (Comptroller General may resolve dispute "using an express option" or other "flexible alternative procedures").

B. The Executive Order and the NLRA

The district court held that because "[p]rivate entities are being prohibited . . . from requiring PLAs that are expressly allowed by the NLRA," the NLRA preempts § 3 of the Executive Order insofar as it applies to "private recipients of federal funding who act as employers in construction projects," 172 F. Supp. 2d at 167 (*citing San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)). In that case, the Supreme Court held that when "the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *Id.* at 244. The district court also held that because the Executive Order "impermissibly attempts to create an

ideally balanced state of bargaining according to the President's conception of open competition among labor and management," *BCTD*, 172 F. Supp. 2d at 167, the NLRA preempts the Executive Order under the teaching of *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). In that case the Court held that neither a state government nor the National Labor Relations Board may regulate an aspect of labor relations that the Congress intended "be controlled by the free play of economic forces." *Id.* at 140.*

The Government argues that we need not determine whether the Executive Order runs afoul of the principles established in *Garmon* and *Machinists* because "Executive Order 13202 clearly constitutes proprietary action rather than regulation." We agree.

As the plaintiffs expressly recognize, the principles of NLRA preemption come into play only when the Government is "regulating within a protected zone," and not when it is acting as a proprietor, "interact[ing] with private participants in the marketplace." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) (*Boston Harbor*). The relevant distinction is whether, in placing a labor-related condition upon its award either of a construction contract or of funds to another entity that will

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* The Government contends that the "legal principles developed to govern federal-state relations are ill-suited to cases such as this, which involve relations between two branches of the federal government." Whatever the merit of that argument, this court on at least one occasion has applied the doctrine "to federal government behavior that is thought similarly to encroach into the NLRA's regulatory territory," and specifically to an executive order. *Chamber of Commerce*, 74 F.3d at 1335. As the Government recognizes, the panel is bound to abide by that precedent until it is overturned by the court sitting en banc or by the Supreme Court.

award the construction contract, the Government "acts just [as] a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find," *id.* at 233, or instead seeks to affect conduct "unrelated to the employer's performance of contractual obligations to the [Government]," *id.* at 229; *accord*, *Chamber of Commerce*, 74 F.3d at 1335.

As the Government maintains, § 1 of the Executive Order embodies just "the type of decision regarding the use of labor agreements that a private project owner would be free to make." The construction proviso of the NLRA, 29 U.S.C. § 158(f), "explicitly permits employers in the construction industry . . . to enter into pre-hire agreements," *Boston Harbor*, 507 U.S. at 230, but nothing in that proviso prevents an employer from refusing to enter into such agreements. Thus, § 1 leaves contractors free to determine whether they will use PLAs on government contracts, just as they may determine whether to use PLAs on projects for private owner-developers that neither require nor prohibit their use.

The plaintiffs argue that at least § 3 of the Executive Order is regulatory rather than proprietary because it applies only to federally funded rather than to Government-owned projects; but that argument proceeds from too crabbed an understanding of proprietorship. First, the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity. Second, that the Government is a lender to or a benefactor of, rather than the owner of, a project is not inconsistent with its acting just as would a private entity; a private lender or benefactor also would be concerned that its financial backing be used efficiently. In sum, the distinction between federally owned and federally funded projects is not relevant here.

The plaintiffs also contend that "when the Government acts through blanket, across-the-board rules that 'flatly prohibit' . . . certain actions on the part of its contractors and recipients of its financial assistance, its conduct is clearly regulatory," whereas it acts in a proprietary capacity when it makes an "ad hoc" contracting decision. According to the plaintiffs, this distinction finds support in *Chamber of Commerce*, 74 F.3d at 1337 (observing Executive Order No. 12,954 "cannot be equated to the ad hoc contracting decision made by [the State] in seeking to clean up Boston Harbor"); but the plaintiffs misread that case, as did the district court, *see BCTD*, 172 F. Supp. 2d at 170 ("EO 13202 sets a blanket rule and does not require government agencies to act on a project-by-project basis, as was the case in *Boston Harbor*"). In *Chamber of Commerce*, we held that Executive Order No. 12,954 was regulatory not because it decreed a policy of general application, as opposed to a case-by-case regime, but because it disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government. *See* 74 F.3d at 1338 (executive order "ha[d] the effect of forcing corporations wishing to do business with the federal government not to hire permanent replacements even if the strikers are not the employees who provide the goods or services to the government"). It is not surprising, therefore, that neither the district court nor the plaintiffs offer any good explanation why a "blanket rule"—applicable to all government contracts, but not to the non-government contracts of those who do business with the Government—is somehow inconsistent with the action of a proprietor. We agree with the Government that there simply is "no logical justification" for holding that "if an executive order establishes a consistent practice regarding the use of PLAs, it is regulatory even though the only decisions governed by the executive order are those that the federal government makes as [a] market participant." *See Kahn*, 618 F.2d at 789 (under Procurement Act, President

may exercise "authority over those larger administrative and management issues that involve the Government as a whole").

A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it "addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." 507 U.S. at 228-29. Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the government." Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory."

Finally, the plaintiffs point out that § 1(a) of the Executive Order could be read to prohibit any recipient of federal funds from using a PLA for work on "related construction project(s)" that are not funded by the Government. The meaning of the word "related" in § 1(a) is indeed unclear. The plaintiffs argue that as a result the Executive Order "cannot fairly be characterized as affecting only the particular contract in which the Government has a financial interest." When confronted with this reading, however, the Government disavowed any construction of the Executive Order that would prohibit an entity that uses a PLA in a non-federally funded project from receiving federal funds. We have no reason to doubt, and every reason to hold the Government to, that interpretation of § 1(a).

III. Conclusion

For the foregoing reasons, we conclude that the President acted within his constitutional authority in issuing Executive Order No. 13,202 and that the Executive Order expresses a

proprietary policy that is not subject to preemption by the NLRA. Therefore, the judgment of the district court is reversed and its injunction is vacated.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-0902 (EGS) [28-1] [64-1]

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

JOE M. ALLBAUGH, DIRECTOR FEDERAL EMERGENCY MANAGEMENT AGENCY, *et al.*,

Defendants.

November 7, 2001, Decided

OPINION

Judges: EMMET G. SULLIVAN, *United States District Judge*.

MEMORANDUM OPINION

Plaintiffs Building and Construction Trades Department of the AFL-CIO ("BCTD"), Contra Costa Building and Construction Trades Council ("Contra Costa BCTC"), and the City of Richmond ("Richmond") commenced this lawsuit to enjoin the enforcement of Executive Order 13202 ("EO 13202"), issued by President George W. Bush on February 17, 2001. EO 13202 prohibits federal agencies or recipients of federal funding from requiring or prohibiting Project Labor Management Agreements ("PLAs") in the bid specifications or other authorizing documents for construction contracts.

Plaintiffs argue that EO 13202 is without authority and is preempted by the National Labor Relations Act ("NLRA"). Plaintiffs have named as defendants the federal agencies that are tasked with implementing EO 13202 and that provide funding subject to EO 13202 for construction projects in which the plaintiffs are involved.

Pending before the Court are cross-motions for summary judgment. Upon consideration of the parties' motions, oppositions, replies, and counsels' representations at oral argument, the motions by amicus curiae, as well as the applicable statutory and case law, the Court concludes that the plaintiffs' motion for summary judgment and for permanent injunctive relief must be GRANTED and the defendants' motion for summary judgment must be DENIED. Constitutional and statutory precedent of long-standing persuades the Court that the President lacked the requisite authority for Executive Order 13202. Accordingly, enforcement of EO 13202 is permanently enjoined.

BACKGROUND

1. Project Labor Management Agreements

Executive Order 13202 prohibits federal agencies and recipients of federal funding from requiring or prohibiting PLAs in the implementing documents for construction projects. Exec. Order No. 13,202, 66 Fed. Reg. 11225 (February 22, 2001), *amended by* Exec. Order No. 13,208, 66 Fed. Reg. 18717 (April 6, 2001). PLAs are "pre-hire" collective bargaining agreements that are generally prohibited by the NLRA. Contractors or owners and labor unions in the construction industry, however, are explicitly exempted from that prohibition. *See* 29 U.S.C. § 158 (e)-(f) (2001). A PLA is negotiated between an employer that has control over a particular construction project and a group of unions in order to meet the specific labor needs of that project. PLAs bind all contractors and subcontractors to a variety of provisions,

which generally include: (1) recognition of signatory unions as sole representatives of covered workers; (2) prohibition of strikes and lockouts; (3) a dispute resolution process; (4) uniform rules on overtime and working hours; (5) hiring through union referral systems; and, (6) set wages for craft workers. *See* United States General Accounting Office, Report to Congressional Requesters, *Project Labor Agreements: The Extent of Their Use and Related Information* (May 1998).

PLAs are generally negotiated at the beginning of a construction project. Once an agreement has been reached, the employer will award contracts only to those contractors and subcontractors who agree to abide by the PLA. The process by which the PLA is negotiated and the contracts are awarded differs slightly depending on whether an employer is a private or public entity.

Private employers may negotiate directly with labor unions to create a PLA that will bind all contractors and subcontractors on a project to its terms. The employer can then either simply hire contractors who agree to abide by those terms, or grant the contracts through a competitive bidding process. If there is a bidding process, the employer will include the PLA in the bid specifications as a material requirement.

For public entities, the process is slightly more complicated. The process includes assessing the value of a PLA for a particular project, selecting a construction or project manager to negotiate and implement the agreement, negotiating the agreement, reviewing the agreement, and enforcing the agreement. Most public entities by law must use a competitive bid process to award contracts. *See* Mem. of Law of Amicus Curiae New York State Thruway Authority. A negotiated PLA is enforced by including it in the bid

specifications for the project. Most state competitive bidding statutes require that a PLA be included in the bid specifications for a project as a material condition. *Id.* at 5 n.6.

In the absence of a PLA, individual unions and individual contractors can negotiate pre-hire agreements that set the terms and conditions for the workers and subcontractors who work for that particular contractor. However, these individual pre-hire agreements are not PLAs in that they can not establish uniform standards for an entire project.

2. EO 13202

Section 1 of EO 13202 applies to federal agencies who award construction contracts, and specifies the substantive prohibitions of the EO. Section 3 of EO 13202 applies to recipients of federal funding and incorporates the prohibitions of § 1:

> Section 1. To the extent permitted by law, any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Govern-
> ment authority nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:
>
> (a) *Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s);* or
>
> (b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

> (c) Nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection (a).
>
> Sec. 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that *neither the bid specifications, project agreements, nor other controlling documents* for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, *shall contain any of the requirements or prohibitions set forth in section 1(a) or (b)* of this order.

Executive Order 13202, 66 Fed. Reg. 11225 (February 22, 2001).

EO 13202 states that its authority lies in "the Constitution and laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*" *Id.*

EO 13202 superceded President Clinton's June 1997 memorandum, which directed that executive agencies "may, on a project-by-project basis, use a project labor agreement on a large and significant project" when that agency determines it will "advance the Government's procurement interest in cost, efficiency and quality and in promoting labor-management stability . . ." President's Memorandum, "The Use of Project Labor Agreements for Federal Construction Projects" at 1, 1997 WL 309842 (June 5, 1997). The memorandum filled the vacuum created when President Clinton repealed the former President George Bush's Executive Order 12818 [1], which explicitly prohibited the use of the

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[1] Executive Order 12818, titled "Open Bidding on Federal and Federally Funded Construction Projects," October 23, 1992, revoked by

PLAs in contracts in which federal agencies were parties. *See* "Revocation of Certain Executive Orders Concerning Federal Contracting," Exec. Order No. 12,836, 58 Fed. Reg. 7045 (Feb. 1, 1993), revoking Exec. Order No. 12818, 57 Fed. Reg. 48713 (Oct. 23, 1992).

3. Plaintiffs

Plaintiff BCTD is a an organization within the AFL-CIO consisting of fourteen national and international unions representing more than one million employees in construction and related industries throughout the United States and Canada. *See* Pls.' Motion for Summ. J., Ex. 4 (Second Decl. of Edward C. Sullivan). BCTD is the parent organization to over 300 local building and construction councils in the United States, including the Contra Costa BCTC, also a plaintiff here. *Id.* The Department and its affiliated councils are parties to PLAs across the United States on projects conducted by both private and public entities. *Id.* at P6 Prior to the issuance of EO 13202, many of these PLAs were on federal agency projects and projects receiving federal financial assistance *Id.; see also* Pls.' Motion for Summ. J., Ex. 5 at P4 (Decl. of William "Giz" Kaczorowski).

BTCD entered into a PLA with the construction manager for Maryland's State Highway Administration, for the purpose of participating in Maryland's construction of the Woodrow Wilson Bridge Project. The project was slated to receive over $ 1.5 billion in Department of Transportation funds. BTCD's PLA was submitted to the Federal Highway Administration ("FHWA") in order to be included in the State's bid solicitation for the project, but was denied by FHWA because FHWA believed the PLA was prohibited by EO 13202.

Executive Order 12836, titled "Revocation of Certain Executive Orders Concerning Federal Contracting," Feb. 1, 1993.

Richmond was planning on negotiating PLAs in two of its upcoming urban renewal construction projects with plaintiff Contra Costa BCTC, the Richmond Transit Village ("RTV") and the Ford Assembly Plant ("Ford"). Both projects secured funds from FEMA and HUD of $ 4.5 million and $ 20 million respectively, and the RTV project also received approximately $ 1.7 million of DOT funds. The City Council passed a resolution deciding not to authorize a PLA, citing their belief that EO 13202 would bar federal funding needed to complete the projects. FEMA and HUD since informed Richmond that EO 13202 did not apply to funding pledged by their agencies, as it was already awarded before EO 13202 was executed. The DOT funds for the RTV project are subject to EO 13202. Richmond has not indicated whether it would change its decision on including PLAs as a result, or whether it would be unable to do so for want of the DOT funds.

Richmond also claims it has numerous proposals for construction contracts pending anticipated federal funding, some of which Richmond would normally negotiate a PLA for. In addition, the plaintiffs also cite three other examples of projects that both anticipate receipt of federal funding, and expressed an intention to utilize a PLA before EO 13202 issued. These projects include the St. Louis Airport project, the Washington State Capitol, and the Walnut Creek-San Ramon Valley Improvement Project.

4. Procedural History

The plaintiffs, BCTD, Contra Costa BCTC, and Richmond, filed a motion for preliminary injunction and summary judgment against the defendant federal agencies, claiming that EO 13202 was unauthorized and preempted by the NLRA. Defendants filed a motion to dismiss or, in the alternative, for summary judgment, claiming that plaintiffs lacked standing to sue and that EO 13202 was valid.

Amicus Briefs were filed on behalf of the plaintiffs by: the State of Maryland, the New York State Thruway Authority, the State of New York, the Commonwealth of Massachusetts, and the National Economic Development & Law Center and the Sierra Club. On behalf of the defendants, amicus briefs were submitted by the Associated Builders and Contractors, Inc.,[2] and the National Right to Work Legal Defense Foundation, Inc.

On August 13, 2001, this Court granted plaintiffs' motion for preliminary injunction with respect to enforcement of EO 13202 and the Woodrow Wilson Bridge Project bid specifications that were to be advertised on August 14, 2001. The Court found that plaintiffs would suffer irreparable harm if the bid specifications were advertised without the PLA requirement, and that the plaintiffs were likely to prevail on the merits of their NLRA preemption claim.

In response to this Court's order, on August 20, 2001, the State of Maryland submitted a revised PLA to the Federal Highway Administration for its review, stating that it intended to include the PLA in the bid specifications for the superstructure contract by addendum upon approval by FHWA. *See* Defs.' Mem. of P. & A. in Opp'n to Pls' Mot. for Summ. J. and Mem. of P. & A. in Reply to Pls' Opp'n to Defs.' Mot. to Dismiss, or in the Alternative for Summ. J. (hereinafter "Defs.' Opp'n and Reply"), Ex. 2 (August 20, 2001, letter from Parker Williams, Administrator of the Maryland State Highway Administration to FHWA). The FHWA has approval authority over the bid specifications on

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[2] Joining this same amicus brief were the Associated Builders and Contractors of the Metropolitan Washington, Inc., Associated Builders and Contractors, Golden Gate Chapter, Hispanic Chamber of Commerce of Contra Costa County, Western Electrical Contractors Association, Independent Roofing Contractors of California, and the Coalition for Fair Employment in Construction.

this project. On September 25, 2001, Administrator of the Maryland State Highway Administration wrote to the FHWA indicating that Maryland had not yet received a response to the revised bid specifications and also to a final financial plan submitted on September 4, 2001. *See* Pls.' Reply to Defs.' Opp'n to Mot. for Show Cause Order, Ex. 1. Maryland's letter reiterated its concern that it receive a reply by September 28, 2001, or the October 18, 2001, bid opening date for the superstructure contract would be delayed. *Id.*

On September 28, 2001, the FHWA replied to the State of Maryland's letter of September 25, 2001 in two separate letters. *See* Pls' Unopposed Mot. for Leave to Supplement Reply to Defs.' Opp'n to Mot. for Show Cause Order. The first September 28, 2001 letter approved the Financial Plan, thereby removing that impediment from proceeding on the superstructure contract. The second September 28, 2001 letter referred specifically to the bid specifications that were revised to include the PLA after this Court entered the preliminary injunction on August 13, 2001. In that letter, the FHWA stated:

> With regard to the PLA, the FHWA has on several occasions advised the State that the recent judicial decision preliminarily enjoining President Bush's Executive Order has required us to develop standards and procedures for reviewing the Woodrow Wilson Bridge PLA that Maryland submitted on August 20, 2001. That process is not yet complete and until it is, we are not able to properly review and approve or disapprove the PLA.
>
> The FHWA offered no timeframe for when those standards and procedures may be in place. The FHWA further stated that it had already approved one set of bid specifications. The FHWA suggested "we see no reason why Maryland cannot go forward with its scheduled October 18, 2001, bid opening date with the current bid

specifications, thus avoiding any delay in the project completion date." The approved bid specifications to which the FHWA referred are the subject of this Court's preliminary injunction.

On October 3, 2001, the State of Maryland informed the Court that it has extended the bid opening for the superstructure contract until November 29, 2001.

DISCUSSION

Plaintiffs contend that the Executive Order is invalid, as the President lacked constitutional or statutory authority to promulgate EO 13202, and is preempted by the NLRA. Plaintiffs argue that EO 13202 conflicts with the NLRA because: (1) EO 13202 prohibits the use of PLAs by public agencies and the recipients of federal funding; (2) the NLRA authorizes the use of PLAs, or at least intended for the use of PLAs to be unregulated; and, (3) the D.C. Circuit requires that an Executive Order in conflict with the NLRA is invalid under NLRA preemption doctrine and must be enjoined. Defendants argue that plaintiffs lack standing to challenge EO 13202, the President had both constitutional and statutory authority to promulgate EO 13202, and the EO 13202 does not conflict with the NLRA.

All plaintiffs have standing in this case. The Court rejects the government's extremely narrow understanding of the injury and causation requirements of standing doctrine. Moreover, the Court holds that the President lacked constitutional or statutory authority to promulgate at least Section Three of the EO 13202, which places conditions on the receipt of federal funds. Furthermore, the Court holds that EO 13202 violates both the *Garmon* and *Machinists* NLRA preemption doctrines.[3] EO 13202 violates *Garmon*

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[3] *See generally San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *Machinists v. Wisconsin*

preemption with respect to federally-funding projects conducted by private entities because the use of PLAs by private entities is expressly protected by the NLRA. EO 13202 violates *Machinists* preemption doctrine with respect to projects conducted by public entities, including both the recipients of federal funding and federal agencies themselves, because EO 13202 alters the balance of economic bargaining power between labor organizations and federally-funded project owners by eliminating the option of requiring a PLA in project bid specifications. Thus, both §§ 1 and 3 of EO 13202 are unlawful.

I. Standing

The three plaintiffs, BCTD, Contra Costa BCTC, and the City of Richmond, have met the constitutional standing requirements. In order to satisfy Article III's standing requirements, a plaintiff must meet three tests: injury, causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The Supreme Court has defined an injury in fact to be "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180. Causation requires that "the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* Finally, redress-

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Employment Relations Comm'n, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976).

ability demands that "it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

A. BTCD

1. Individual standing with respect to § 3.

BCTD has suffered a concrete and particularized injury, caused by EO 13202, that can be redressed by enjoining the enforcement of EO 13202. The government has advocated an extremely narrow conception of standing that goes far beyond Supreme Court precedent and the policy of judicial restraint that the standing doctrine reflects.

The government has repeatedly argued that Maryland, as the recipient of federal funding, is a more appropriate party than BCTD and is not present as a party in this case. *See* Defs.' Opp'n and Reply at 34. However, in responding to a similar argument that the "wrong parties" were before the Court, the Supreme Court has held that it is "self-evident" that "more than one party may have standing to challenge a particular action or inaction. Once it is determined that a particular plaintiff is harmed by the defendant, and that harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue." *Clinton v. City of New York*, 524 U.S. 417, 434-436, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998).

a. Injury in Fact

BCTD argues that the injury it has suffered as the result of the enactment of EO 13202 was the loss of the PLA it negotiated with the State of Maryland for the Woodrow Wilson Bridge Project and the ability to negotiate similar agreements with other project owners. That agreement named BCTD as the exclusive bargaining agent for the employees on the project, and determined the terms and conditions of

employment for all workers on the project. The loss of that agreement is a particularized and concrete harm to BCTD, a labor organization that stood to play an important role in the project as the exclusive bargaining agent. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (loss of construction contract by subcontractor resulting from federal financial incentive to general contractors to hire minority-owned businesses sufficient injury to support standing); *Motor & Equipment Mfrs' Ass'n v. Nichols*, 330 U.S. App. D.C. 1, 142 F.3d 449, 457 (D.C. Cir. 1998) ("'When a challenged agency action authorizes allegedly illegal [activity] that will almost surely cause [a] petitioner to lose business,' that petitioner has standing to make a claim.") (*quoting El Paso Natural Gas Co. v. FERC*, 311 U.S. App. D.C. 52, 50 F.3d 23, 27 (D.C. Cir. 1995)). Furthermore, in addition to losing its appointment as the exclusive bargaining agent, BCTD had an interest in the terms and conditions of employment that were amenable to labor interests and reflected in the agreement.

In addition, the loss of the ability to negotiate a global agreement with the State of Maryland or any other project owner that would benefit labor interests and would apply to all contractors on the project is a change in bargaining position that has been recognized by the Supreme Court as an injury for Article III purposes. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 433 n.22, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) ("We have held, however, that a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result.") The loss of the ability to negotiate and enter into PLAs with recipients of federal funding, to a very large labor organization that regularly enters into such agreements is itself a particularized and concrete harm. BCTD and its member councils are

parties to PLAs across the country. They are parties to PLAs with both public and private entities, including recipients of federal funding. As the President of BCTD explained,

> One of the goals of the Department and its affiliated Councils is to exercise our rights under the National Labor Relations Act to negotiate PLAs to govern labor relations on construction projects, and to do so on as many projects as we are able under market conditions . . . Prior to the issuance of Executive Order 13202 the Department regularly sought to negotiate, and did negotiate, PLAs on projects receiving federal funding.

Pls.' Mot. for Summ. J., Ex.4 at ¶ 7. The uncontroverted fact that plaintiffs regularly negotiated and entered PLAs with both public and private recipients of federal funding, and are no longer able to do so because of EO 13202, is sufficient injury to support standing to challenge § 1 and § 3 of EO 13202 with respect to both public and private recipients of funding. Pls.' Motion for Summ. J., Ex.4 at ¶ 6.

Defendants argue to the contrary that BCTD has not suffered an adequate injury in fact because the PLA it negotiated with the State of Maryland is outside the protection of the NLRA, and as a result plaintiffs have no legally protected interest under the NLRA on which to base standing. The government's extremely narrow conception of standing's injury requirement is not supported by the Supreme Court's interpretation of Article III of the Constitution. Citing *Lujan*, defendants argue that standing should be limited to an injury to a "legally protected interest." Defs.' Opp'n and Reply at 7. However, defendants then narrow the range of possible legally protected interests on which standing can be based, arguing that when a plaintiff challenges an executive order as preempted by federal statute, the plaintiff's injured interest must be a right created by that statute. Thus, defendants argue that because the PLA negotiated by BCTD does not fall within § 8(e) of the NLRA, BCTD has no legally

protected interest on which to base standing to challenge the EO as preempted by the NLRA. *Id.* at 9, 20. This argument misconstrues the language of *Lujan* on which defendants rely and conflates the issue of whether a plaintiff has a private right to sue under a particular statute with the constitutional standing requirement. In order to challenge a government action as violating a particular statute, a plaintiff's injury need not be specifically protected by that statute. For example, in *Bennett v. Spear*, the Supreme Court upheld the standing of ranchers who stood to lose water usage because of a biological decision issued by the Fish and Wildlife Service and who challenged the substance of that biological decision under the citizen suit provision of the Endangered Species Act ("ESA"). 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). Clearly, the ranchers' water rights were not protected by the ESA, but the Court found that loss of the use of water was concrete and particularized injury for Article III purposes sufficient to allow the ranchers to challenge the government's action as unlawful. 520 U.S. at 168. As the Supreme Court has stated, standing's injury inquiry, grounded in the case or controversy requirement of Article III, focuses not on the nature of the claim, but on the harm to the plaintiff. *See Flast v. Cohen*, 392 U.S. 83, 99, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) (standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated").

Whether or not the PLA negotiated by BCTD falls within § 8(e) of the NLRA is an important question relevant to the merits of this case. Standing, however, does not turn on the applicability of the NLRA to this particular agreement. Even if the Woodrow Wilson Bridge Project PLA is not covered by § 8(e), BCTD had an agreement for that PLA that was rendered unenforceable by an allegedly unlawful government action. Because BCTD lost the benefits it stood to gain under that agreement, its designation as the exclusive bargaining agent for the employees on the project and the agreed upon

terms and conditions for employment, as well as the opportunity to negotiate similar agreements with other owners, BCTD has suffered an actual injury sufficient for Article III purposes.

b. Causation

Of course, not every government action that somehow interferes with an existing contract or agreement gives the affected parties standing to challenge that government action. In addition to the requirement of injury, a party must show both causation and redressability. *Laidlaw*, 528 U.S. at 181. This is precisely the lesson of *Lujan*. In *Lujan*, the Supreme Court recognized the standing of both those who are the direct objects of government regulation, and those who are impacted by government regulation through less direct means. 504 U.S. at 561-62; *see also Bennett*, 520 U.S. at 168-69. The *Lujan* Court indicated that causation is easily satisfied when the injury is the direct result of government action of which the plaintiff is the object. *Lujan*, 504 U.S. at 561-62. Causation may also be established when the impact is less direct, i.e., when the plaintiff's injury is produced by some third party action that is the result of a "determinative or coercive effect" of government action. *Bennett*, 520 U.S. at 168-69; *Lujan*, 504 U.S. at 561-62. While indirect causation is possible, the Supreme Court has yet to define the precise parameters for determining when indirect causation is sufficient for standing purposes. Each court faced with such a question must determine how much "coercion" is sufficient to hold that the government's action caused a third party's action to injure the plaintiff.

The parties disagree as to the nature of the coercive effect of EO 13202 on the recipients of federal funding who negotiate with labor organizations like BCTD. Defendants contend that there can be no causation between EO 13202 and any harm to BCTD because the decision whether or not to require a PLA or accept federal funding was a voluntary

action by an independent third party, the State of Maryland. The fact that a third party made the decision that directly impacted the plaintiff does not foreclose a determination of causation. As the Supreme Court in *Bennett v. Spear* recognized, this argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." 520 U.S. at 169. The loss of the PLA must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Laidlaw*, 528 U.S. at 181. Thus, in order for this Court to deny standing because of a lack of causation, the decision by the State of Maryland to reject the PLA must be sufficiently voluntary and independent of the threatened loss of federal funding.

Defendants ask the Court to hold that the action of a recipient of federal funds is *necessarily* voluntary when the only threatened sanction is the loss of funds. Defendants concede that as a result of EO 13202, a "grantee may well decide that it would rather retain the federal grant funds and, therefore give up the option of mandating the use of a PLA on a federally financed construction project." Defs.' Opp'n and Reply at 30-31. Thus, defendants argue that even when EO 13202 is the *actual* and *only* cause of a recipient's decision to accept federal funding and forgo a PLA, if there are no sanctions for the recipient beyond losing the funds, the recipient's decision has not been coerced or determined.

To borrow the words of the D.C. Circuit, "we need not attempt any broad explanation of the justiciability of indirect injury, for one narrow proposition is clear." *Telephone and Data Systems Inc. v. FCC*, 305 U.S. App. D.C. 195, 19 F.3d 42, 47 (D.C. Cir. 1994). This Court holds that it is clear that when plaintiffs can prove that the federal government's conditional funding offer is the *actual* and *only* reason for a recipient's decision, causation has been established. In other

situations involving conditional funding or financial incentives created by the federal government, when a decision-maker is faced with many factors, it may well be too speculative to hold that one factor caused a decision. *See, e.g., Allen v. Wright*, 468 U.S. 737 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (holding that causation was too speculative when parents of black children challenged IRS' failure to enforce policy of denying tax benefits to racially-discriminatory private schools); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (holding that causation was too speculative between hospital denials of services to the poor and an IRS policy granting favorable tax treatment to non-profit hospitals who offered only emergency room treatment to the poor). Nevertheless, when plaintiffs can prove to the requisite standard of proof that the decision was actually caused by the federal government's threat to cease funding, and only by that threat, no speculation as to causation is required. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (holding that "of course" plaintiff had standing to challenge lost contract when contract loss was actually caused by minority-preference system).

BCTD has presented sufficient uncontroverted evidence here to prove that the State of Maryland's decision to forgo the PLA on the Woodrow Wilson Bridge Project was caused by the promulgation of EO 13202. The plaintiffs negotiated an extensive PLA for the Project. *See* Pls.' Motion for Summ. J., Ex. A. On January 2, 2001, shortly before the agreement was publically announced, the State of Maryland informally submitted the PLA to FHWA for review. *See* Pls.' Motion for Summ. J., Ex. 4 at § 19. On January 8, 2001, the State of Maryland informed potential bidders that a PLA had been negotiated and recommended to be included in the project contracts. *Id.* at § 20; Pls.' Motion for Summ. J., Ex. B. On January 9, 2001, the PLA was formally submitted to FHWA for review. *Id.* at § 19. In a letter dated January 17, 2001, the

FHWA recommended minor changes. *Id.* Those changes were circulated and incorporated into a revised PLA. *See* Pls.' Motion for Summ. J., Ex. A. While the FHWA was reviewing the submitted PLA, on February 17, 2001, President Bush issued EO 13202. In a letter dated February 21, 2001, the FHWA informed Maryland that it was "unable to approve a PLA for this project," because of EO 13202. No other reason was given. *See* Pls.' Motion for Summ. J., Ex. C. Maryland subsequently removed the PLA from the bid specifications and issued contracts on the foundation portion of the bridge that did not include the PLA. *See* Pls.' Motion for Summ. J., Ex. 4 at § 24.

Furthermore, after the Court preliminarily enjoined the application of EO 13202 to the Woodrow Wilson Bridge Project bid specifications to be announced on August 14, 2001, Maryland revised those bid specifications to include the PLA. As explained above, Maryland's request to FHWA for approval of the revised bid specifications was submitted on August 20, 2001, and is still pending. This evidence clearly indicates the but for EO 13202, Maryland would have included the negotiated PLA in its bid specifications for all contracts on the Woodrow Wilson Bridge Project.

Rather than focus on whether EO 13202 was the actual and only cause of Maryland's decision to remove the PLA from the bid specifications, defendants focus on the level of coercion generally caused by an offer of conditional funding. Defendants argue that BCTD lacks standing because the decision by Maryland whether or not to comply with the requirements of EO 13202 in exchange for the federal funding, is *necessarily* a voluntary and independent action of a third party because there is no sanction beyond the threatened loss of funding. However, defendants have not offered sufficient justification, grounded in precedent, conceptions of federalism, or a coherent theory of standing doctrine, on which to base this bright-line distinction.

The implications of defendants' standing argument are great; defendants' interpretation of standing would allow only the recipient of federal funding to ever challenge restrictions placed on the receipt of funds by Congress through legislation or the President though an Executive Order.[4] Without a coherent theoretical justification, this Court declines to hold as a matter of law that in every conditional funding case the only entity with standing to sue is the recipient of the funds.

In support of its argument that decisions to accept funding are never determined or coerced, defendants cite Supreme Court precedent upholding conditional spending grants as legitimate exercises of Congress' Spending Clause authority. *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). However, contrary to defendants' argument, in upholding spending clause statutes, the Court does not address the question of whether a conditional spending grant is "voluntary," or impermissibly "coercive;" rather, the test for the legitimacy of spending clause legislation asks the following: 1) whether the legislation serves the general welfare; 2) whether the imposition of conditions on spending was unambiguous; 3) whether the conditions are sufficiently related to the purposes of the spending; and 4) whether any other constitutional provision bars the condition. *Dole*, 483 U.S. at 207. Because courts do not assess the coercive impact of conditional spending on a recipient, the defendants' reliance on spending clause doctrine for the proposition that the acceptance of conditional funding is not a coerced decision is misplaced.

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[4] From the perspective of a funding recipient, there are no relevant differences in the level of coercion created by conditions on funding placed through an act of Congress or through an Executive Order. Thus, the government's argument about coercion (or lack thereof) in this case would apply to any challenge to legislation authorized by the Spending Clause.

Furthermore, a crucial step in the logic of defendants' argument is that a "voluntary" decision is necessarily not a coerced or determined decision for standing purposes. Defendants cite cases for the proposition that compliance with an Executive Order by the recipients of federal funding is voluntary because the Executive Order does not have the force of law. *See AFL-CIO v. Kahn*, 199 U.S. App. D.C. 300, 618 F.2d 784 (D.C. Cir. 1979) (en banc); *see also* EO 13202 § 11 (stating that the Executive Order creates no legal rights). However, the fact that acceptance of conditional funding is voluntary in the sense that those conditions are not legally enforceable by the recipient, does not necessarily mean that the Executive Order has not *caused* the recipient's decision. Defendants' argument must rest on something more than the fact that Executive Orders are not legally binding.

Defendants also attempt to distinguish *Bennett v. Spear*, where the Court upheld the standing of individuals impacted by a third party decision, by identifying reasons why the third party's decision in *Bennett* was less voluntary than the funding recipients' decisions here. Defendants correctly point out that the level of coercion in *Bennett v. Spear* between the Fish and Wildlife Service's biological opinion under the ESA and the Bureau of Reclamation was greater than what occurred between the federal government and the State of Maryland with respect to the funding for the Woodrow Wilson Bridge Project. In *Bennett*, the Bureau was free to reject the FWS's opinion only if it presented justifiable reasons for doing so, despite its own lack of expertise in the area, and if it was wrong, the FWS's employees could be subject to criminal sanctions under the ESA. For these reasons, the Court held that the Bureau's decision to follow the FWS's opinion was sufficiently coerced to allow a challenge to the FWS by those ranchers impacted by the Bureau. Importantly, nowhere in *Bennett* did the Supreme Court indicate that *Bennett* established a floor or minimal standard for coercive effect. In fact, the *Bennett* Court

thought it was presented with an easy case. *See Bennett*, 520 U.S. at 171 (indicating that "it is not difficult to conclude that petitioners have met their burden . . . of alleging that their injury is 'fairly traceable' to the Service's Biological Opinion"). And as much as the Court was influenced by the potential sanctions on the FWS, it was also convinced by the empirical evidence that the Bureau made its decision because of the FWS opinion, citing the fact that up until the FWS Opinion the Bureau had operated in the same fashion for years and had given no indication of changing the water usage rules for ranchers until the *FWS Opinion*. 520 U.S. at 170. Thus, while the facts of *Bennett* do perhaps present a stronger case for a coerced third party decision, nothing in *Bennett* precludes a finding that the State of Maryland's decision was "fairly traceable" to EO 13202.

In addition, the government relies on the standing holding in *Center for Reproductive Law & Policy v. Bush*, 2001 U.S. Dist. LEXIS 10903, No. 01-CIV-4986(LAP), *2001* WL 868007 (S.D.N.Y. July 31, 2001). CRLP involved a challenge by a U.S. advocacy group to certain conditions on U.S. foreign aid that require recipients to abstain from engaging in abortion-related activities. *CLRP*, 2001 WL 868007 at *1. CRLP claimed that those restrictions impair its advocacy activities by causing foreign recipients of funding to refrain from assisting those activities. *Id.* At first blush, the holding with respect to causation in *CRLP* does seem on point and supports the government's argument. A closer analysis reveals that the District Court's reasoning is conclusory and relies for support only on a Second Circuit decision that did not discuss standing at all. The District Court relied on language from the Second Circuit's decisions in *Planned Parenthood Fed. of Amer. v. AID*, 915 F.2d 59 an earlier challenge to similar policies under President Reagan. (2d Cir. 1990) (restrictions were not unconstitutional); 838 F.2d 649, 655-56 (2d Cir. 1988) (case did not present non-justiciable issue). The *CRLP* Court has confused the Second Circuit's

holding on the merits of the constitutional challenge to the funding restrictions with the causation requirement for standing.[5] Because the District Court provided no other support beyond the Second Circuit's *Planned Parenthood* decision for its conclusion that the funding recipients' actions were sufficiently independent to prevent standing, this Court does not find the *CRLP* decision persuasive.

Furthermore, defendants' position is undermined by Supreme Court precedent. Other Supreme Court cases that uphold standing for plaintiffs impacted when the government alters financial incentives for third parties, indicate that fairly traceable standard requires a level of coercion much lower than the circumstances at issue in *Bennett*. In *Adarand Constructors, Inc. v. Pena*, a white subcontractor who had submitted the low bid on a federally-funded project but was denied the contract challenged the constitutionality of a federal policy of giving financial incentives to general contractors who hire minority subcontractors. 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The recipient of the financial incentive, the general contractor, did not challenge the policy. The Supreme Court did not even question the standing of the subcontractor to challenge the federal policy, writing that of course" it had standing based on the injury of the lost contract. 515 U.S. at 210 ("Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract"). The decision by the general contractor in *Adarand* to forgo the low bid and offer the

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[5] In order to reach the merits of the plaintiffs' constitutional claims in *Planned Parenthood*, the Second Circuit assumed standing. 915 F.2d at 66 ("we do not address the government's arguments concerning standing"). While such an assumption of standing was clearly improper after *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), it is clear that the Second Circuit's analysis did not address the standing issue at all.

contract to a minority subcontractor was coerced only by the financial incentive, yet the Court did not view that decision as sufficiently independent to break the chain of causation for the subcontractor's injuries.

Similarly, in *Clinton v. City of New York*, the Court held that an association of potato farmers formed for the purpose of *acquiring* potato processing facilities had standing to challenge the line item veto by the President of a statutory provision that gave tax relief to the *sellers* of such facilities. 524 U.S. 417, 432, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998). One of the members of the association was in the process of negotiating the acquisition of a facility when President Clinton utilized the line item veto to eliminate the tax break for the seller of that facility. *Id.* at 426-27. The Supreme Court recognized that the government's action, an elimination of a financial incentive for sellers, created a significant probability of harm to potential buyers so as to fulfill the causation requirement for standing. *Id.* at 432. The Supreme Court explained that Clinton's veto of the tax relief altered market conditions by eliminating the benefit purchasers had gained when they "received the equivalent of a statutory 'bargaining chip'" to use in negotiations with sellers. *Id.* Similarly, labor organizations possess a bargaining chip in their ability to negotiate with recipients of federal funding to require PLAs on projects. The government's action, EO 13202, has created a significant financial incentive for potential recipients of federal funding to forgo such negotiations with labor organizations, thus substantially altering market conditions by eliminating the labor organizations' bargaining chip. As the Supreme Court held in *Clinton*, "by depriving them of their . . . bargaining chip, the [challenged action] inflicted a sufficient likelihood of economic injury to establish standing under our precedents." *Id. (citing, e.g., Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971); 3 Kenneth Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994) ("The Court

routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy [Article III standing]."")). If decisions to sell or not sell by the owners of the potato processing plants in *Clinton* were fairly traceable to the federal removal of a financial incentive, so too should be the decision by the State of Maryland to comply with the conditions for federal funding.

For all these reasons, the Court rejects the government's argument that funding recipients' decisions to accept funds are necessarily voluntary and holds that BCTD has met the causation requirement.

c. Redressability

If this Court grants the requested permanent injunctive relief and invalidates EO 13202, Maryland has indicated that it will require a PLA for the Woodrow Wilson Bridge project.[6] After the preliminary injunction hearing on August 13, 2001, Maryland submitted a revised PLA to the FHWA for approval, indicating that it intends to include the PLA in the bid specifications by addendum. *See* Defs.' Opp'n and Reply, Ex. 2. Maryland has since communicated with the FHWA its request that the FHWA approve the revised bid specifications that include the PLA as soon as possible. *See* Pls.' Reply to Defs.' Opp'n to Motion for Show Cause Order, Ex. 1. Maryland clearly intends to include the PLA in the bid specifications should this Court grant permanent injunction invalidating EO 13202. Accordingly, plaintiffs have met their burden of establishing that the proposed injunctive relief will redress the injury caused by EO 13202.

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[6] Defendants have not challenged standing on redressability grounds.

2. Individual standing with respect to § 1.

BCTD also has standing to challenge § 1 of EO 13202 because it has been injured by EO 13202's prohibition on federal agencies requiring PLAs on construction contracts for federally-owned projects. That injury is the loss of the ability to negotiate and enter into project-wide agreements that benefit labor interests. EO 13202 has taken from plaintiffs the valuable economic weapon of negotiating PLAs with project owners, the opportunity to represent all workers on a project in collective bargaining, and the beneficial working conditions that PLAs guarantee.

BCTD's injury with respect to federal agencies is real and actual, and not just speculative. Plaintiffs have produced uncontroverted evidence that prior to the effective date of EO 13202, BCTD regularly entered into PLAs with public and private project owners, including both federal agencies and those who receive federal funding. See Pls.' Motion for Summ. J., Ex. 5 at P4. As the Kaczorowski Declaration explained:

> Each year, the Department and its Councils enter into numerous PLAs. Many of these PLAs involve projects financed at least in part with federal funding, including agreements with federal agencies or federal contractors. The Department and its Councils will continue to enter into numerous PLAs, and but for Executive Order 13202, would continue to do so on projects funded by the Federal Government.

Id.

Furthermore, the causal chain with respect to § 1 is clear: EO 13202 prohibits federal agencies from including PLAs in the bid specifications or other contract documents for federally owned projects. EO 13202 does not present federal agencies with a choice; rather it directly prohibits federal agencies from including PLAs in their bid specifications.

Finally, given the size and nature of BCTD, and the regularity with which BCTD entered into PLAs with federal agencies prior to EO 13202, an injunction invalidating § 1 will result in BCTD's negotiations of further PLAs on federally-owned projects. There is nothing in the record to suggest that some other intervening factor will prevent federal agencies from entering any PLAs in the future on construction projects—and when they do, BCTD is the most likely candidate to participate in those negotiations. In addition, the invalidation of EO 13202 will return to BCTD the valuable tool it has lost—the ability to negotiate a PLA with federal project owners and their construction managers.

For all these reasons, BCTD has standing to challenge § 1 of EO 13202.

3. Associational standing

BCTD also has associational standing on behalf of its members. In addition to having standing in its own right, an organization or association may have standing to bring suit on behalf of its members when: 1) the members would otherwise have standing to sue in their own right; 2) the interests at stake are germane to the organization's purpose; and 3) neither the claim nor the requested relief requires the participation of the individual members. *Laidlaw*, 528 U.S. at 181; *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Here, plaintiffs argue, and defendants contest, that BTCD has associational standing on behalf of its members in addition to standing in its own right as a labor organization.

The above discussion of injury, causation, and redress-ability also applies to the standing of BCTD's members. Thus, the first prong of the associational standing test is satisfied because BCTD's member unions also have standing in their own right.

The interests at stake in this litigation—the ability of federal agencies and the recipients of federal funding to require PLAs for their projects—are germane to the purpose of BCTD. BCTD is an organization comprised of fourteen national and international unions representing more than one million employees in construction and related industries throughout the United States and Canada. BCTD is also the parent organization to over 300 local building and construction councils in the United States. Prior to the issuance of EO 13202, BCTD regularly negotiated PLAs with public and private entities, including both federal agencies and recipients of federal funding.

Finally, the equitable relief sought, the invalidation of EO 13202 does not require the participation of those local councils.

B. City of Richmond

Richmond originally identified two federally-funded projects, the Ford and RTV projects, for which it intended to use PLAs prior to the issuance of EO 13202. *See* Pls.' Mem. in Support of Pls.' Mot. for Summ. J. or, in the Alternative, Application for Prelim. Inj. (hereinafter "Plfs.' Opening Br.") at 19. The Richmond City Council passed a resolution deciding not to authorize a PLA for either project, citing its belief that EO 13202 applied to the federal funding needed to complete the projects.

1. The Ford Project.

At the time this case was filed, Richmond was of the opinion that the federal funds to be received for the Ford project from both the Federal Emergency Management Administration ("FEMA") and the Department of Housing and Urban Development ("HUD") were subject to EO 13202. In the course of this litigation, however, the defendants informed Richmond that it may use a PLA on the Ford

project without jeopardizing any federal funds because the funds were obligated to Richmond prior to the issuance of EO 13202. Section 2 of EO 13202 specifically exempts contracts awarded prior to the date of EO 13202. Because EO 13202 does not apply to the funds for the Ford Project, Richmond can not have standing to challenge EO 13202 based on that project.

2. The RTV Project.

The parties dispute whether the RTV project can serve as a basis for Richmond's standing in this lawsuit. Richmond will receive federal funding from three sources for the RTV project: FEMA, HUD, and the Department of Transportation ("DOT"). As with the Ford project, neither the FEMA nor the HUD funds are subject to EO 13202 because they were granted prior to February 17, 2001. The DOT funds, however, are subject to EO 13202, and it is on those funds that Richmond bases its standing argument. DOT has committed $1.7 million, which, according to the government, is approximately three percent of the project's anticipated total cost of $ 55 million.

Defendants challenge Richmond's standing by claiming that Richmond has not been injured by the EO 13202 for two reasons: first, the City has not yet decided whether or not to use a PLA on the project now that only three percent of the federal funds are subject to EO 13202; and second, the City can easily segregate the DOT funds and use a PLA for the rest of the project at no cost to the City or harm to the project.

The City Counsel resolution makes clear that Richmond originally decided not to use a PLA on the RTV project because of EO 13202. *See* Plfs' Opening Br., Ex. C. The loss of a PLA that would benefit Richmond is sufficient injury for standing purposes.

However, even if defendants' claim that Richmond has not made a final decision as to whether or not it will use a PLA

on the RTV project is true, Richmond still has standing to challenge the federal program. The potential loss of millions of dollars in federal funding is sufficient injury to support standing to challenge a federal program. *See, e.g., Hodges v. Shalala*, 121 F. Supp. 2d 854, 865 (D.S.C. 2000) (state's potential loss of federal funding sufficient injury to challenge federal program); *Kansas v. United States*, 24 F. Supp. 2d 1192, 1195 (D. Kan. 1998) (same). As a recipient of federal funding subject to EO 13202, Richmond has suffered sufficient injury to support standing.

Second, defendants argue that Richmond has suffered no injury because it is possible to segregate the funds that are subject to EO 13202 from the 97 percent of the project funds that are not. This argument fails for several reasons. First, the plain language of EO 13202 contradicts the defendants' assertion that Richmond should be able to negotiate a PLA for 97 percent of the project as long as the three percent of federal funds subject to EO 13202 are segregated. Defendants cite no language from EO 13202 to support its assertion; in fact, the only authority they cite is a statement from the City Manager that the City may consider this option. Defs.' Opp'n and Reply at 24. The language of EO 13202 is clear: any recipient of federal funding for a project will lose that funding if a PLA is negotiated for the project. Section 3 states: "neither the bid specifications, project agreements, nor other controlling documents for construction contracts . . . by recipients of grants or financial assistance . . . shall contain any of the requirements or prohibitions set forth in section 1(a) or (b) . . ." Nowhere does this language indicate that a recipient may segregate funds within a project. In fact, the language of EO 13202 does not even limit the prohibition on required PLAs to the project for which the funds have been granted—it prohibits "construction contracts" by a recipient of federal funding from requiring PLAs. Because the plain language of EO 13202 requires a recipient to give up funding

if any of the bid specifications for the project require a PLA, Richmond would not be able to avoid injury by segregating the DOT funds.

Furthermore, even if Richmond could segregate its DOT funds, the loss of a PLA for the portion of the project covered by $ 1.7 million is still a sufficiently concrete and particularized injury to justify standing. The primary purpose of a PLA is to cover all of the contracts on a project. The loss of that uniformity is a specific and concrete injury. In addition, the cost and inconvenience to Richmond associated with segregating the DOT funds from the FEMA and HUD funds, and with writing a PLA for only 97 percent of the project, would in itself be economic injury sufficient to support standing to challenge EO 13202.

Thus, defendants' arguments that Richmond has not suffered sufficient injury to support standing are unpersuasive. Furthermore, as a recipient of the federal funds in question, Richmond is the direct object of the EO 13202, and therefore easily satisfies the causation requirement for standing.[7] Finally, the requested injunctive relief will redress Richmond's injuries by allowing Richmond to go forward with a PLA on the RTV project or any other federally-funded project.

C. Contra Costa BCTC

The standing arguments for Contra Costa County BCTC are subject to the same analysis as BTCD, discussed above. *See* Pls.' Opening Br. at 13 n. 14; Defs.' Opp'n and Reply at 25-26, n.5 (agreeing that arguments for Contra Costa BCTC and BCTD are substantially the same). Contra Costa BCTC is in a similar position with respect to the RTV project as BCTD is with respect to the Woodrow Wilson Bridge Project—but for EO 13202, Contra Costa BCTC would have negotiated

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[7] Defendants have not challenged Richmond's standing on either causation or redressability grounds.

with the City of Richmond to require a PLA for the RTV project in which it would be the exclusive bargaining agent for employees on that project, and would have helped determine the terms and conditions of employment on the project. *See* Plfs.' Opening Br., Ex. C. The Richmond City Council made clear that it was not requiring a PLA because of EO 13202, and therefore Contra Costa BCTC's injury is fairly traceable to EO 13202. The requested injunctive relief will open the door for Richmond to negotiate and adopt a PLA, thus redressing Contra Costa BCTC's injury. Accordingly, Contra Costa BCTC has satisfied the injury, causation, and redressability requirements.

However, the Court need not determine standing for Contra Costa BCTC because it has found standing for BCTD and Richmond. It is well-settled that a court need not determine the standing of all plaintiffs when the standing of others has been established. *See, e.g., Clinton*, 524 U.S. at 431 n. 19; *U.S. Airwaves, Inc. v. FCC*, 344 U.S. App. D.C. 10, 232 F.3d 227, 232-33 (D.C. Cir. 2000).

II. Standard of Review

Summary judgment should be granted only if the moving party has shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *AKA v. Washington Hosp. Ctr.*, 325 U.S. App. D.C. 255, 116 F.3d 876, 879 (D.C. Cir.), *reh'g en banc granted*, 124 F.3d 1302 (1997). Likewise, in ruling on cross-motions for summary judgment, the court shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed. *See Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir. 1975).

III. Constitutional and Statutory Authority

The President's authority to issue an Executive Order "must stem either from an act of Congress or from the

Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 96 L. Ed. 1153, 72 S. Ct. 863 (1952); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89, 143 L. Ed. 2d 270, 119 S. Ct. 1187 (1999). Section 3 of EO 13202 stems from neither. To borrow the words of the Supreme Court in *Youngstown*, "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." 343 U.S. at 588.

EO 13202 cites the President's general authority under the "the Constitution and laws of the United States of America," and in particular, the Procurement Act (or "the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*"). Despite the fact that the Procurement Act is the only specific authority cited in EO 13202, and despite the fact that defense counsel initially represented to the Court at oral argument that the Procurement Act authorized § 3,[8] defendants have since abandoned this argument because that Act clearly does not provide authority for § 3's conditions on the receipt of federal funding. *See generally* Defs.' Surreply. While § 1 involves contracting by federal agencies, and is arguably authorized by the Procurement Act,[9] § 3 attempts to regulate the conditions of contracts by recipients of federal

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[8] *See* Transcript of September 19, 2001 hearing at 78 ("It's a procurement regulation, and it's true for both 13202, for Section 1 and Section 3. What it says is that the federal government has an interest when it's procuring for itself or when it's giving out money that is going to be used for procurement by somebody else . . ."). Defense counsel did also indicate at the hearing that the Constitution authorized EO 13202. *Id.* at 5-7.

[9] The Court need not reach the scope of the Procurement Act and the authority for § 1 because the parties have not briefed that issue. The authority for § 1 is presumed for purposes of deciding the NLRA preemption issue.

funding. The Procurement Act, which addresses contracting by the federal government, simply is not relevant to conditions placed on the funding of projects owned and conducted by parties other than the federal government.

Defendants now argue that EO 13202 § 3 is authorized by both the Constitution and several federal statutes other than the Procurement Act. *See* Defs.' Surreply at 1.

A. Constitution

Defendants' constitutional argument rests on the "well-established" power of the President to supervise and guide subordinate executive officials to ensure the consistent execution of the laws. *See* Defs' Surreply at 2 (*citing Meyer v. Bush*, 299 U.S. App. D.C. 86, 981 F.2d 1288, 1312 (D.C. Cir. 1993). Because EO 13202 § 3 contains the caveat "to the extent permitted by law," argue the defendants, § 3 is simply a directive by the President to agencies to guide their implementation of existing statutes. Thus, the defendants argue for the very first time in their surreply brief, "in order to determine whether, and to what extent, Section 3 of EO 13202 will apply to a particular grant, the legislation and regulations governing that grant must be examined." Defs' Surreply at 3. Defendants place far too much weight on the words "to the extent permitted by law" than those words can bear.

Defendants' argument that EO 13202 is simply a constitutionally-authorized guidance by the President on the implementation of existing law is unpersuasive. EO 13202 does much more than guide agencies as to how to implement existing statute—it creates substantive prohibitions for federal agencies and substantive conditions on the receipt of federal funding. Once again, the words of the Supreme Court in the *Youngstown* case are particularly applicable here. 343 U.S. at 587-88. In *Youngstown*, the government also argued that the general Article II power of the President to take care

that the laws be faithfully executed justified an action without any other basis in the Constitution or statutes. *Id.* The Court rejected that argument:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States * * *.' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'

Id. The reasons that the *Youngstown* Court believed the President's action at issue in that case exceeded his Constitutional authority and intruded upon Congress' law-making powers are also particularly applicable here:

> The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question.

Id. Here, the preamble of EO 13202 sets forth the policy justification for the order, § 1 and § 3 establish substantive

rules of conduct, and § 7 directs the Federal Regulatory Council to amend its regulations to implement the order. As the *Youngstown* Court concluded, the Constitution does not independently authorize such a legislative action by the President absent a direct Congressional authorization.

B. Statute

In defending the statutory authority for § 3, defendants make two somewhat conflicting arguments. First, as explained above, defendants argue for the very first time in their surreply that, "in order to determine whether, and to what extent, Section 3 of EO 13202 will apply to a particular grant, the legislation and regulations governing that grant must be examined." Defs' Surreply at 3. Second, defendants argue that there is one general statute that authorizes § 3, independent from the specific statutes under which particular grants have been authorized. That statute is 31 U.S.C. § 6701(a)(1), which authorizes the Director of the Office of Management and Budget (OMB) to issue interpretive guidelines for the use of procurement contracts, grant agreements and cooperative agreements.[10] Defendants' argument with respect to the individual grant-authorizing statutes fails for several reasons. First, there is no evidence in the record that agencies actually make any sort of interpretation of the underlying statutes prior to prohibiting the recipients of federal funding from using a PLA. The FHWA gave no indication of such analysis in any of its letters to the State of Maryland declining to approve the PLA because of EO 13202. Nor can defendants point to any guidelines or regulations instructing agencies to conduct such statutory analyses prior to denying a recipient of federal funding the

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[10] The reason these two arguments conflict is that if the OMB statute really provided authority for § 3's conditions on grant assistance, there would be no need to examine the scope of each individual grant statute for independent authority.

use of a PLA. In this respect, EO 13202 stands in stark contrast with former President George Bush's Executive Order concerning the use of PLAs. 57 Fed. Reg. 48713 (Oct. 28, 1992). In contrast to the blanket prohibition here, that order provided that:

> The heads of executive agencies shall, within 30 days of the date of issuance of this order, review all statutes under their jurisdiction that provide authority to issue grants or enter into cooperative agreements for construction projects and identify any statute that provides authority to condition a grant award or cooperative agreement on the recipient's or party's agreement that neither bid specifications, project agreements, nor other controlling documents pertaining to the grant or cooperative agreement contain any of the elements specified in section 1(a)(1)-(3), above.

Id. at Sec. 2. (a).

Second, even if defendants' argument were a plausible reading of EO 13202's "to the extent permitted by law" language, the underlying grant-authorizing statutes simply do not support the prohibition on the use of PLAs that the EO 13202 has created. The Court has not surveyed the countless statutory provisions that authorize the distribution of federal funds, and neither have defendants. Defendants erroneously assert that the only statutes at issue here are those that authorized the funds for the Woodrow Wilson Bridge Project and Richmond's RTV Project. The issue before the Court is the President's authority to issue this EO 13202 § 3, not just the authority of DOT to implement EO 13202 with respect to these projects. If defendants are going to rely on the authority of the underlying funding statutes for this Executive Order, then defendants should have pointed to the language that supports EO 13202's blanket PLA prohibition in every statute

that appropriates funds for entities conducting construction projects. Defendants have not, and the Court believes, can not, do that.

If the language of defendants' chosen examples is any indication of Congress' general practice, there is no statutory authority for § 3 to be found. Defendants argue that both the Woodrow Wilson Bridge Project and the RTV Village Project receive funding "under programs established pursuant to the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.*" Defs.' Surreply at 3.[11] The general references to "securing competition" and "conditions of project approval" cited by defendants as the foundation for § 3 simply can not be stretched so far as to support § 3's substantive conditions on the receipt of federal funding. Defendants cite a provision in the Federal-Aid Highway Act that allows the Secretary of Transportation to require "such plans and specifications and such methods of bidding as shall be effective in securing competition" as the basis for the authority of the President to prohibit the use of PLAs by funding recipients.[12] 23 U.S.C. § 122(a). That provision must be put in context; the statute states:

> (a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be

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[11] Curiously, defendants do not point to any language in the statute that actually appropriated the funds for the Woodrow Wilson Bridge Project. *See* Woodrow Wilson Bridge Authority Act, *as amended*, Pub. L. 105-78, 112 Stat. 159.

[12] The Court notes that what the President has attempted to achieve here through an Executive Order is a regulation that the Secretary of Transportation could promulgate only through rule-making procedures required by the Administrative Procedures Act (APA). Because the statutory language does not provide the authority for the President's action, the Court need not address the questions raised by the President's attempted bypass of the APA's requirements.

> made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

Id. Congress was clearly discussing the procedures for bid submission, and not the substantive requirements that a State may impose upon prospective bidders. The Act does discuss substantive requirements that bidders must fulfill; Congress explicitly *permitted* such requirements as long as they are lawful and bidders are given sufficient notice:

> No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

23 U.S.C. § 112(b)(1). Had Congress intended to prohibit funding recipients from requiring the use of PLAs on each of these federally-funded projects, it certainly could have included language in each funding statute to that effect.

Defendants' second statutory authority argument is equally unpersuasive. Defendants rely on 31 U.S.C. § 6307(a)(1), which authorizes the Director of the OMB to "issue supplementary interpretive guidelines to promote consistent and efficient use of procurement contracts, grant agreements, and cooperative agreements." This statute does delegate authority to OMB to adopt guidelines for the administration of grants; however, once again Congress was clearly referring to procedural rather than substantive requirements.

The purposes of the OMB statute are: 1) to "help eliminate unnecessary administrative requirements on recipients of Government awards by characterizing the relationship between executive agencies and contractors," 2) "prescribe criteria for executive agencies in selecting appropriate legal

instruments," and 3) "promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements." 31 U.S.C. § 6301. The reference to increasing competition in using grants refers to competition among grant recipients, not among those with whom a grant recipient contracts. The competition that defendants argue is increased by EO 13202 is the competition among those contractors bidding on federally-funded projects, not competition among those asking for federal funds. Thus, 31 U.S.C. § 6307(a)(1), can not provide the authority for a regulation aimed at creating substantive limitations on the requirements grant recipients can create for those with whom they contract.

In sum, neither the Constitution, the Procurement Act, the individual funding statutes, nor the OMB statute provide the necessary authority for § 3 of EO 13202. This Court has no choice but to invalidate § 3 of EO 13202 as an action beyond the scope of the President's authority.

IV. NLRA Preemption

If any doubt remains as to whether the President had the constitutional or statutory authority to promulgate § 3 of EO 13202, the Court also holds that both § 1 and § 3 of EO 13202 are preempted by the NLRA. In the guise of preserving open competition and government neutrality, EO 13202 has altered the balance of power between labor unions and employers on federally-funded construction projects. Couched in the language of creating a free market in which unions and employers can negotiate PLAs without the mandate or support of the project owners, EO 13202 has actually interfered with existing market conditions. EO 13202 removes the ability of labor organizations, federal agencies, and recipients of federal funding to negotiate PLAs to be included in the bid specifications for construction projects.

EO 13202 has thus altered market conditions by removing both a significant bargaining chip from the hands of labor organizations, and an option from federally-funded construction projects that is available to private owner-developers. Even if the PLAs in question are not directly authorized by the NLRA because the funding recipients are public entities, the Supreme Court has indicated that such market interference by states would violate the *Machinists* doctrine of NLRA preemption. *See Building & Contr. Trades Council v. Associated Builders & Contractors of Massachusetts / Rhode Island*, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (*Boston Harbor*). Indeed, the D. C. Circuit foreshadowed the present controversy in *Chamber of Commerce v. Reich*, a case holding that the NLRA preempts the President from interfering with the labor market through an Executive Order. *Chamber of Commerce v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1337 (D.C. Cir. 1996). Because EO 13202 violates NLRA preemption doctrine, this Court grants plaintiffs' motion for summary judgment and enters a permanent injunction invalidating EO 13202.

A. Preemption and the NLRA

Because the NLRA does not contain an express preemption provision, a court should not find a governmental regulation pre-empted ". . . unless it conflicts with federal law or would frustrate the federal scheme, or unless [the court] discern[s] from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States . . ." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-748, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985); *see also Boston Harbor*, 507 U.S. at 224. Keeping this principle in mind, the Supreme Court has developed two specific preemption doctrines for the NLRA. *Metropolitan Life*, 471 U.S. at 748 ("The Court has articulated two distinct NLRA preemption principles."). The first, known as *Garmon* pre-emption prohibits regulation of activities that are "protected

by § 7 of the [NLRA] or constitute an unfair labor practice under § 8." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *see also Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986); *Metropolitan Life*, 471 U.S. at 748-49. The second, known as *Machinists* preemption prohibits regulation of areas that have been left by Congress "to be controlled by the free play of economic forces." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976); *see also Boston Harbor*, 507 U.S. at 225; *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) (*Golden State II*); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986) (*Golden State I*).

While most Supreme Court cases developing NLRA pre-emption doctrine have dealt with state regulation, it is clear that the same principles apply when the President attempts to regulate an area pre-empted by the NLRA through an Executive Order. *Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322 ("The [NLRA preemption] principles developed, however, have been applied equally to federal governmental behavior that is thought similarly to encroach into the NLRA's regulatory territory.").[13]

B. *Garmon* Preemption

EO 13202 does not violate the *Garmon* preemption rule with respect to federally-funded construction projects conducted by public entities. However, EO 13202 does violate *Garmon* preemption with respect to federally-funded projects conducted by private employers.

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[13] *Reich* also rejected the claim that a President's Executive Order was insulated from judicial review. 74 F.3d at 1322. Thus, plaintiffs may bring a non-statutory cause of action for review of the legality of an Executive Order. *Id.*

The Supreme Court in *Garmon* recognized that Congress' intent to exclusively occupy the field of labor policy would require judicial elucidation via inquiry into the scope of the NLRA: "Congress has formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of determination by fixed metes and bounds... This penumbral area can be rendered progressively clear only by the course of litigation." *Garmon*, 359 U.S. at 240 (quoting *Weber v. Anheuser-Busch Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955)). The Court has further explained that *Garmon* preemption extends to activities that are either clearly or "*arguably*" protected or prohibited by the NLRA. *Boston Harbor*, 507 U.S. at 225 (emphasis in original); *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986) ("the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."). Plaintiffs have raised a *Garmon* preemption claim, arguing that the President has regulated something that is "expressly protected" by § 8(e) of the NLRA. *See* Plaintiffs' Opening Brief at 43-44. Thus, this Court must determine whether the PLAs prohibited by EO 13202 are at least arguably authorized or prohibited by the NLRA.[14]

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[14] Much of defendants' discussion of this issue comes during its standing argument. *See* Defs.' Opp'n and Reply at 7-20 (arguing that because these PLAs are not protected by the NLRA, plaintiffs have no legally protected interest on which to base standing). As noted above, whether or not the NLRA regulates PLAs entered by public entities is relevant to the merits of the preemption claim, not to standing and thus will be discussed here. Plaintiffs have not taken an entirely clear position

1. EO 13202

EO 13202 functions in two ways: it effectively prohibits federal agencies and recipients of federal funding from negotiating a project-wide PLA with labor unions, and it prohibits agencies or recipients from including any agreements voluntarily negotiated between labor unions and contractors directly in any bid specifications for the project. As discussed above, EO 13202 prohibits federal agencies and the recipients of federal funding from requiring or prohibiting PLAs in their construction contracts, bid specifications, or other controlling documents. EO 13202 § 1, 3 (a recipient shall not "require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction project(s)."). This effectively prohibits recipients of federal funding from negotiating with labor unions and agreeing to a project-wide PLA that will be required of all contractors.

Generally, the method by which contractors are required to agree to a PLA is through the bid specification process—a project owner will include the PLA in the bid specifications as a material requirement. If a project owner can not include a PLA in the bid specifications or other documents, as is prohibited by EO 13202, it can not enforce the PLA. Because it can not enforce the PLA, negotiating one would be pointless.

In addition, while EO 13202 prohibits agencies and funding recipients from requiring PLAs, it also states that "nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection [a]." EO 13202 at § 1(c). Thus, under

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on this issue, as their brief at times claims the PLAs negotiated by public entities are protected by the NLRA and at times admits that they are not. *Compare* Pls.' Opening Br. at 19, 43-44 (NLRA applies) *with* Pls.' Opening Br. at 38 n. 34 (NLRA does not apply to public projects).

EO 13202 labor unions and contractors are free to negotiate individual labor agreements. Plaintiffs argue that such individual agreements differ from a PLA in that they are unlikely to cover an entire project. Further, EO 13202 prohibits any such individual agreements from being included in the bid specifications for the project if the project is to receive federal funding. As discussed above, the mechanism by which PLAs are negotiated for public construction projects relies for the enforcement of the agreement on the inclusion of that agreement in the bid specifications. Indeed, many states statutorily require that any PLAs be included in those bid specifications. *See* Mem. of Law of Amicus Curiae New York State Thruway Authority at 5-6; Mem. of Law of Amicus Curiae State of Maryland at 9. Thus, the "voluntary" negotiation provision of EO 13202 is a poor substitute for the ability of recipients and labor organizations to negotiate and require PLAs.

Defendants have argued that EO 13202 requires only that a recipient not use a PLA for the portion of the project using federal funds subject to 13202. *See* Defs.' Opp'n and Reply at 21-27 (arguing that the City of Richmond can segregate funds and use a PLA on the 97 percent of the project not subject to the EO). As discussed above with respect to Richmond's RTV project, such segregation is contrary to the plain language of EO 13202. EO 13202 clearly prohibits the requirement of a PLA in any bid specifications or contracts for a federally-funded project.

2. The Scope of NLRA § 8(e) and (f)

The NLRA defines and proscribes unfair labor practices and creates a uniform system of labor law for the country. 29 U.S.C. § 158 (2000); *Reich*, 74 F.3d at 1338. The provisions of the NLRA at issue here, § 8(e) and (f), were added to the NLRA by Congress in 1959. Section 8(e)

prohibits the use of pre-hire agreements such as PLAs, but also includes an exception for the construction industry:

> nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e). Section 8(f) further provides,

> it shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members,

and then goes on to describe several types of generally prohibited agreements to which the exception is created. 29 U.S.C. § 158(f). Congress' intent in creating these exceptions for the construction industry was explained by the Supreme Court in *Boston Harbor*:

> It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry. *See* S.Rep. No. 187, 86th Cong., 1st Sess., 28,

55-56 (1959); H.R.Rep. No. 741, 86th Cong., 1st Sess., 19-20 (1959) U.S.Code Cong. & Admin. News p. 2318.

507 U.S. at 231.

Sections 8(e) and (f) of the NLRA do not apply to PLAs negotiated and required by public recipients of federal funding, like the State of Maryland or Richmond in this case, or by federal agencies themselves, for two reasons that were articulated by the Supreme Court in *Boston Harbor*, 507 U.S. at 230-31.[15] First, the exceptions in §§ 8(e) and (f) specifically apply to "employers," and public entities are expressly excluded from the definition of employer in the NLRA. 29 U.S.C. § 152(2) ("employer" does not include, "United States or any wholly owned Government corporation . . . or any State or political subdivision thereof"); *Boston Harbor*, 507 U.S. at 230-31. Second, when a public entity, like a federal agency, the State of Maryland in the present case, or the State of Massachusetts in *Boston Harbor*, advertises for bids by general contractors who then hire subcontractors on a construction project, according to the Supreme Court the State is acting not as an employer, but as a "purchaser" of contracting services. *Id.* As such a purchaser rather than an employer, §§ 8(e) and (f) do not apply. *Id.*

Plaintiffs argue that PLAs required by public recipients of federal funding are authorized by the NLRA, and rely on language from *Boston Harbor*. *See* Pls.' Opening Br. at 19, 33-34, 43-44. However, the passages from *Boston Harbor* cited by plaintiffs do not bear the weight plaintiffs would have them support. The Supreme Court did recognize in *Boston Harbor* that public owners should be able to require

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[15] While the Court in *Boston Harbor* did recognize that public entities' PLAs were outside the scope of the NLRA's express regulations, importantly, the Court recognized that these PLAs were within "Congress' intended free play of economic forces" for purposes of *Machinists* preemption, discussed below. 507 U.S. at 232.

PLAs because Congress intended for that decision be left to the free play of economic forces, and therefore recognized the applicability of *Machinists* preemption doctrine. However, contrary to plaintiffs' argument, the Court did not conclude that a public owners' PLA was authorized or protected by the NLRA. Rather, for the two reasons described above, the Court concluded that these PLAs were beyond the reach of express NLRA regulation. In a footnote, plaintiffs seem to concede that PLAs "negotiated directly between a public entity and a union" would not be covered by §§ 8(e) and (f). *See* Pls.' Opening Br. at 38 n.34. In distinguishing "directly" negotiated PLAs, which would not be covered, from the PLA at issue on the Woodrow Wilson Bridge Project, which they claim is covered, plaintiffs must be relying on the fact that the State of Maryland hired a project manager, Kaiser, to negotiate the PLA. However, because Kaiser was clearly acting as an agent of the state, that distinction makes no difference here. The PLA negotiated between BCTD, Kaiser and the State of Maryland for the Woodrow Wilson Bridge Project, does not fall within the express provisions of §§ 8(e) and (f).

However, §§ 8(e) and (f) clearly apply to PLAs required by private employers. *See, e.g., Woelke v. Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982).

3. *Garmon* Applied to EO 13202.

Because the NLRA does not specifically prohibit or authorize the use of PLAs by construction projects owned by public entities, there is no conflict between EO 13202 §§ 1 and 3 with Congress' "integrated scheme of regulation" specified in NLRA §§ 7 and 8. *Garmon*, 359 U.S. at 247. Although *Garmon* preemption also applies to activities *arguably* prohibited or authorized by EO 13202, the NLRA is clear that public entities are not employers for purposes of §§ 8(e) and (f). EO 13202 therefore does not violate the principles of

Garmon preemption with respect to its prohibition of PLAs required by federal agencies or public recipients of federal funding. EO 13202 §§ 1 and 3.

However, because the NLRA does specifically authorize the use of PLAs by private employers in § 8, EO 13202's prohibition of required PLAs does violate *Garmon* preemption doctrine with respect to any private recipients of federal funding who act as employers in construction projects. Private entities are being prohibited by EO 13202 from requiring PLAs that are expressly allowed by the NLRA. *Garmon* preemption will not allow this direct conflict. EO 13202 is pre-empted with respect to private recipients of federal funding.

C. *Machinists* Preemption

1. EO 13202 §§ 1 and 3 Violate *Machinists* Preemption.

As the Supreme Court explained in *Boston Harbor*, "*Machinists* preemption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." 507 U.S. at 226 (internal quotations omitted); *see also Golden State I*, 475 U.S. at 614. The Supreme Court has consistently held that a state, local (or federal) government "lacks the authority to introduce some standard of properly balanced bargaining power . . . or to define why economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining." *Boston Harbor*, 507 U.S. at 226 (internal quotations omitted); *see also Golden State I*, 475 U.S. at 614; *Machinists*, 427 U.S. at 149-50. This is precisely what the President has attempted to do with EO 13202. EO 13202 impermissibly attempts to create an ideally balanced state of bargaining according to the President's conception of open competition among labor and management.

As the D.C. Circuit explained in *Reich*, the principle underlying *Machinists* preemption is that "union and management proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA] recognized.'" 74 F.3d at 1334 (*quoting NLRB v. Insur. Agents' Int'l Union*, 361 U.S. 477, 488-89, 80 S. Ct. 419, 4 L. Ed. 2d 454 (1960)). Here, the Executive Order removes an economic weapon from the arsenals of two different groups: federal agencies and the recipients of federal funding lose the ability to require PLAs in their bid specifications and labor organizations lose the ability to negotiate PLAs directly with the recipient owner-developers.

Indeed, the D.C. Circuit in *Reich* foreshadowed this case: "we very much doubt the legality of President Bush's Executive Order 12, 818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements under § 8(f)." 74 F.3d at 1337. EO 13202 is substantively the same as the former President Bush's Executive Order 12818. The reason the D.C. Circuit expressed doubt about the legality of such an Executive Order was because the Supreme Court's analysis in *Boston Harbor* made it clear that a regulation mandating or prohibiting pre-hire agreements would violate the *Machinists* preemption rule.

In *Boston Harbor*, the Supreme Court addressed the argument that a decision by the State of Massachusetts and its project manager for the Boston Harbor clean-up to include a PLA in its bid specifications was government regulation that violated NLRA preemption principles. The Court rejected that argument, holding that the decision by the State with respect to this one project did not constitute regulation, but rather was the action of a market participant, and as such could not run afoul of either *Garmon* or *Machinists*

preemption. 507 U.S. at 232. In so deciding, the Court discussed the goals of NLRA §§ 8(e) and (f), and the implications of a decision by the Court prohibiting a state from requiring a *PLA*. 507 U.S. at 231-32. The Court recognized that "to the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same." *Id.* Without an indication from Congress that "a State may not manage its own property when it pursues its purely property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted," the Court concluded that it would not "infer such a restriction." *Id.* The Court explicitly stated that such an inference by the Court, as a form of governmental regulation of the labor market, could run afoul of *Machinists* preemption principles: "Indeed, there is some force to petitioners' argument . . . that denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists.*" *Id.* at 232.

While the Court in *Boston Harbor* was discussing the impact of its own decision on actors in the labor market, there is no material difference between a judicial action and the Executive Order as forms of government regulation. Both would impermissibly "deny[] an option to public owner-developers that is available to private owner-developers." *Id.* at 232. By prohibiting the recipients of federal funding the option of requiring a PLA in their bid specifications, EO 13202 impermissibly interferes with the free play of economic forces that only Congress can regulate. *See also Reich*, 74 F.3d at 1337 ("Surely, the result [of the Boston Harbor case] would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all

construction contractors doing business with the state to enter into collective bargaining agreements . . . containing § 8(e) prehire agreements.").

Furthermore, while the *Boston Harbor* Court focused on the disparity between public and private developers, EO 13202 also removes an economic weapon from the arsenal of labor organizations. *Machinists* preemption is concerned with the areas left to the free play of economic forces between both employers and employees. *Reich*, 74 F.3d at 1337 (holding that an Executive Order disqualifying employers who hire permanent replacement workers during strikes from government contracts violates *Machinists* preemption). Any attempt to regulate either of these groups is problematic. As the D.C. Circuit explained in *Reich*, "No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or her purpose may be." 74 F.3d at 1337.

2. Defendants' Arguments to the Contrary are Not Persuasive.

Defendants have raised several arguments during the course of this litigation against the applicability of *Machinists* preemption. First, EO 13202 is not preempted by the NLRA because it imposes no sanctions on funding recipients. Second, EO 13202 was the act of the federal government as a market purchaser, and under *Boston Harbor* is therefore not subject to NLRA preemption. Third, *Machinists* preemption does not apply here because the government has only attempted to establish neutrality, rather than skewing the labor market. Fourth, *Machinists* preemption does not apply here because while NLRA preemption precludes government interference with rights protected by the NLRA, it does not require the government to subsidize those rights. Fifth, because EO 13202 allows "voluntary" PLAs among contractors and labor unions, it represents a minimal intrusion into the collective bargaining process.

a. Defendants' Sanction Argument.

Defendants argue that EO 13202 does not conflict with the NLRA because it imposes no sanctions on entities regulated or protected by the NLRA. *See* Defs.' Opp'n and Reply at 39-46. Thus, defendants attempt to distinguish the *Reich* case by demonstrating that the Executive Order in *Reich* directly sanctioned employers who were subject to express NLRA provisions. While it is unclear from defendants' brief, this argument can best be understood as a variation on the *Garmon* theme: that here there is no direct conflict between EO 13202 and an area expressly protected or prohibited by the NLRA, and therefore EO 13202 is not pre-empted under *Garmon* principles. While defendants' focus on sanctions is misplaced,[16] the basic thrust of the argument has merit. *See* Defs' Opp'n and Reply at 45 and 56. As discussed above, with respect to public recipients of federal funding, *Garmon* preemption does not apply.

b. Defendants' Market Participant Argument.

Defendants also argue that EO 13202 is a reflection of the federal government's proprietary interest and not an attempt to regulate the labor market. Relying on the Supreme Court's holding in *Boston Harbor* that Massachusetts was not subject to NLRA preemption when acting as a market participant rather than as a regulator, defendants argue that EO 13202 is a reflection of the government's proprietary interest in determining how its money is spent. See Defs.' Opp'n and Reply at 58.

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[16] *Garmon* preemption is clearly not limited to those government actions that impose sanctions or deny government benefits to entities covered by the NLRA. Rather, interference of any form, with the activities that constitute "Congress' integrated scheme of regulation," meaning "activities that are protected by § 7 of the NLRA, or constitute an unfair labor practice under § 8" is prohibited under *Garmon. Boston Harbor*, 507 U.S. at 224 (citing *Garmon*, 359 U.S. at 244).

In support of this argument, defendants claim that in order for government action to be considered regulatory for NLRA preemption purposes it not only must be of general application, but also reflect an intent to regulate labor policy. *See* Defs.' Opp'n and Reply at 59-60. This is not correct. Both *Boston Harbor and Reich* made clear that the nature of a regulatory versus proprietary action is a separate question from the question of whether that action interferes with something either regulated by the NLRA or left for the free play of economic forces. *Reich,* 316 U.S. App. D.C. 61, 74 F.3d 1322, 1334 ("we are . . . quite reluctant to consider the President's motivation in issuing the Executive Order. . . It is not necessary for us to question the President's motivation in order to determine whether the Order is a regulation. . ."). The government's argument conflates these two separate inquiries by hinging the regulatory nature of an action on an intent to regulate labor.

EO 13202 is clearly a regulatory act rather than the government "acting just like a private contractor would act." *Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1336 (*quoting Boston Harbor*, 935 F.2d 345, 366 (Breyer, C.J. dissenting)). EO 13202 sets a blanket rule and does not require government agencies to act on a project-by-project basis, as was the case in *Boston Harbor*. Section 3 of EO 13202 attempts to regulate the behavior of entities other than the federal government, an action that is uniquely governmental. With respect to § 1 of EO 13202, the rule for federal agencies, the D.C. Circuit held that the similar directive to federal agencies at issue in *Reich* was a regulatory rather than proprietary act. 74 F.3d at 1337. Indeed, the D.C. Circuit contrasted what the Supreme Court held to be the proprietary action of Massachusetts in *Boston Harbor* with a hypothetical action by Massachusetts very similar to EO 13202. *Id.* at 1332. "Surely," emphasized the D.C. Circuit, "the result would have been entirely different, given the Court's reasoning [in Boston Harbor], if Massachusetts has passed a

general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into collective bargaining agreements." *Id.* at 1334.

Finally, defendants argue that EO 13202 must be a proprietary action because it imposes no sanctions or restrictions on anyone other than federal agencies and recipients of federal funds. However, by imposing a general condition for all federal agencies and all recipients of federal funding under all funding statutes, the government has acted in a regulatory capacity. The fact that no one other than the agencies or the funding recipients may be sanctioned does not alter the broad policy implications of EO 13202. The government is using the power of its purse to control and regulate the behavior of other market participants. *Boston Harbor*, 507 U.S. at 233.

c. Defendants' Neutrality Argument.

In attempting to counter plaintiffs' *Machinists* argument, defendants argue that EO 13202 was intended to "take governmental entities out of the decision-making process" and "to allow the question of whether or not to use a PLA to be settled through bargaining between construction contractors and labor organizations." Defs.' Opp'n and Reply at 67. Defendants actually concede that "to be sure, EO 13202 affects market conditions by precluding federal agencies and federal grantees from mandating the use of PLAs on federal or federally financed construction projects." *Id.*

Machinists preemption applies to governmental attempts to establish "neutrality" in the labor market as much as it does to attempts to skew the balance of power in favor of employers or employees. Government "lacks the authority to introduce some standard of properly balanced bargaining power . . . or to define why economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining." *Boston Harbor*, 507 U.S. at 226 (internal quo-

tations omitted). Even if EO 13202 was aimed at creating a free market in which labor and employers could interact, and not intended to remove economic weapons from labor organizations, the President does not have the authority to establish his vision of a neutral labor market. *Reich*, 83 F.3d 439, 440 (denying petition for rehearing) ("[*Machinists*] does prevent any government action . . . that is predicated upon (implicitly or explicitly) a substantive policy view as to the appropriate balance of bargaining power between organized labor and management and that attempts to promote a governmental objective by a generic shift in that balance."). Thus, because EO 13202 reflects the President's attempt to establish a "neutral" labor market, and in doing so actually removes economic options from both labor and management, EO 13202 is preempted under *Machinists* doctrine.

d. Defendants' Rights Subsidization Argument.

Defendants also attempt to avoid *Machinists* preemption with the argument that government refusals to subsidize rights do not infringe upon rights. Citing *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), they argue that since a governmental refusal to subsidize something protected by the NLRA, can not be an infringement of rights under the NLRA, EO 13202 can not be said to conflict with the NLRA. This argument misses the point of *Machinists* preemption. Once again, *Machinists* preemption is not concerned with rights created under the NLRA, but focuses on an area Congress intentionally left unregulated. *Machinists*, 427 U.S. at 144. The Court's inquiry must focus not on whether the government's conditional refusal to subsidize an activity has infringed upon a particular right, but whether it constitutes a regulatory interference with the free play of economic forces. Plaintiffs may not have a right under the NLRA to negotiate PLAs with

public recipients of federal funding, but neither does the Executive branch have the right to prevent such negotiations. That regulation is for Congress, and Congress alone.

e. Defendant's Voluntary PLA Argument.

Defendants also argue that because EO 13202 allows for voluntary PLAs, the intrusion on the collective bargaining process is minimal and therefore can not violate *Machinists* preemption. Even if voluntary PLAs were an adequate substitute for mandatory PLAs, as the D.C. Circuit stated in *Reich*, "we do not think the scope of the President's intervention into and adjustment of labor relations is determinative." 74 F.3d at 1338. However, as explained above, the voluntary labor agreements allowed under EO 13202 are poor substitutes for the prohibited PLAs for two reasons: first, the voluntary PLAs are not permitted to be included in the bid specifications and are therefore difficult to enforce; and second, the likelihood of all parties on a project independently agreeing to the same terms after contracts have been awarded is slim.

Defendants arguments have not persuaded the Court that both § 1 and § 3 of EO 13202 can avoid *Machinists* preemption. The President has intruded upon a sphere that only Congress can regulate and therefore this Court must permanently enjoin EO 13202.

CONCLUSION

For the foregoing reasons, the Court is persuaded that all plaintiffs in this case have standing to challenge EO 13202. The Court is also persuaded by precedent of long-standing that by issuing EO 13202, the President exceeded his constitutional and statutory authority, at least with respect to § 3. In addition, because the President has attempted through EO 13202 to establish his vision of a neutral labor market, and in doing so removed an economic weapon from labor

organizations, federal agencies, and the recipients of federal funding, the Court is persuaded that EO 13202 § 1 and § 3 violate the *Machinists* principle and are preempted by the NLRA. Finally, with respect to private recipients of federal funding, EO 13202 § 3 is in direct conflict with § 8(e) of the NLRA and is preempted under the *Garmon* principle.

Accordingly, the plaintiffs' motion for summary judgment is GRANTED and the defendants' motion for summary judgment is DENIED. Constitutional and statutory precedent of long-standing persuades the Court that the President lacked the requisite authority for Executive Order 13202 § 3 and that Executive Order 13202 in its entirety is preempted by the NLRA. Accordingly, enforcement of Executive Order 13202 is permanently enjoined by the Court.

An appropriate Order accompanies this Memorandum Opinion.

DATE: 11-7-01

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

ORDER

For the reasons stated in the Memorandum Opinion filed today, it is hereby

ORDERED that plaintiffs' motion for summary judgment is GRANTED; it is

FURTHER ORDERED that defendants' motion for summary judgment is DENIED; it is

FURTHER ORDERED that the President lacked the requisite authority for Executive Order 13202 § 3 and that Executive Order 13202 in its entirety is preempted by the NLRA; it is

FURTHER ORDERED that enforcement of Executive Order 13,202 is permanently enjoined; it is

FURTHER ORDERED that the Clerk of the Court enter final JUDGMENT in favor of plaintiffs and against defendants.

IT IS SO ORDERED.

DATE: 11-7-01

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

Executive Order 13202 of February 17, 2001

Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, and in order to (1) promote and ensure open competition on Federal and federally funded or assisted construction projects; (2) maintain Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects; (3) reduce construction costs to the Federal Government and to the taxpayers; (4) expand job opportunities, especially for small and disadvantaged businesses; and (5) prevent discrimination against Government contractors or their employees based upon labor affiliation or lack thereof; thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects, it is hereby ordered that:

Section 1. To the extent permitted by law, any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Government authority nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:

(a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or

(b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

(c) Nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection (a).

Sec. 2. Contracts awarded before the date of this order, and subcontracts awarded pursuant to such contracts, whenever awarded, shall not be governed by this order.

Sec. 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1(a) or (b) of this order.

Sec. 4. In the event that an awarding authority, a recipient of grants or financial assistance, a party to a cooperative agreement, or a construction manager acting on behalf of the foregoing, performs in a manner contrary to the provisions of sections 1 or 3 of this order, the executive agency awarding the contract, grant, or assistance shall take such action, consistent with law and regulation, as the agency determines may be appropriate.

Sec. 5. (a) The head of an executive agency may exempt a particular project, contract, subcontract, grant, or cooperative agreement from the requirements of any

or all of the provisions of sections 1 and 3 of this order, if the agency head finds that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security.

(b) A finding of "special circumstances" under section 5(a) may not be based on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are nonsignatories to, or otherwise do not adhere to, agreements with one or more labor organizations, or concerning employees on the project who are not members of or affiliated with a labor organization.

Sec. 6. (a) The term "construction contract" as used in this order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The term "executive agency" as used in this order shall have the same meaning it has in 5 U.S.C. 105, excluding the General Accounting Office.

(c) The term "labor organization" as used in this order shall have the same meaning it has in 42 U.S.C. 2000e(d).

Sec. 7. With respect to Federal contracts, within 60 days of the issuance of this order, the Federal Acquisition Regulatory Council shall take whatever action is required to amend the Federal Acquisition Regulation in order to implement the provisions of this order.

Sec. 8. As it relates to project agreements, Executive Order 12836 of February 1, 1993, which, among other things, revoked Executive Order 12818 of October 23, 1992, is revoked.

Sec. 9. The Presidential Memorandum of June 5, 1997, entitled "Use of Project Labor Agreements for Federal Construction Projects" (the "Memorandum''), is also revoked.

Sec. 10. The heads of executive departments and agencies shall revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing the Memorandum or Executive Order 12836 of February 1, 1993, as it relates to project agreements, to the extent consistent with law.

Sec. 11. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right to administrative or judicial review, or any right, whether substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(Presidential Signature)

THE WHITE HOUSE,

February 17, 2001

APPENDIX D

Executive Order 13208 of April 6, 2001

Amendment to Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, and in order to (1) promote and ensure open competition on Federal and federally funded or assisted construction projects; (2) maintain Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects; (3) reduce construction costs to the Federal Government and to the tax payers; (4) expand job opportunities, especially for small and disadvantaged businesses; (5) prevent discrimination against Government contractors or their employees based upon labor affiliation or lack thereof; and (6) prevent the inefficiency that may result from the disruption of a previously established contractual relationship in particular cases; thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects, it is hereby ordered that Executive Order 13202 of February 17, 2001, is amended by adding to section 5 of that order the following new subsection:

(c) The head of an executive agency, upon application of an awarding authority, a recipient of grants or financial assistance, a party to a cooperative agreement, or a construction manager acting on behalf of the foregoing, may exempt a particular project from the requirements of any or all of the provisions of sections 1 and 3 of this order, if the agency head finds: (i) that the awarding authority, recipient of grants or

financial assistance, party to a cooperative agreement, or construction manager acting on behalf of the foregoing had issued or was a party to, as of the date of this order, bid specifications, project agreements, agreements with one or more labor organizations, or other controlling documents with respect to that particular project, which contained any of the requirements or prohibitions set forth in sections 1(a) or (b) of this order; and (ii) that one or more construction contracts subject to such requirements or prohibitions had been awarded as of the date of this order.

(Presidential Signature)

THE WHITE HOUSE,

April 6, 2001.

APPENDIX E

Statutory Provisions

Section 8(e) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §158(e), provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

Section 8(f) of the NLRA, 29 U.S.C. §158(f), provides in relevant part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section [158] for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . . .

(2)

Supreme Court, U.S.
FILED
DEC 9 2002
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No. 02-527

In the Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, AND MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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CONSENT OF PARTIES PURSUANT TO RULE 37.2(a)

Pursuant to Rule 37.2(a), the parties to this action have consented in writing to the submission of this *amici curiae* brief.

THE INTEREST OF THE *AMICI CURIAE*[1]

A. Sheet Metal and Air Conditioning Contractors' National Association

The Sheet Metal and Air Conditioning Contractors' National Association ("SMACNA") is an international trade association representing 4,500 contributing contractor firms who employ more than 100,000 union sheet metal craftsmen. These contractors specialize in work ranging from heating, ventilation and air conditioning; architectural sheet metal; industrial sheet metal; kitchen equipment; manufacturing; testing and balancing; service work; energy management; to siding and decking. SMACNA contractors routinely perform work on job sites covered by project labor agreements ("PLAs"), and have found them useful in bringing projects to completion on time, on budget and without disruption from labor disputes.

[1] No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

B. National Electrical Contractors Association

Local Chapters of the National Electrical Contractors Association ("NECA") are the bargaining representatives for over 19,000 electrical contracting firms, employing in excess of 250,000 electrical workers. NECA enhances the industry through continuing education, labor relations, and promotional activities. NECA is comprised of 119 Chapters, which engage in collective bargaining with local unions of the International Brotherhood of Electrical Workers. As with SMACNA, many of NECA's members perform work on construction projects covered by PLAs, and they have a strong interest in maintaining the availability of PLAs as a tool on complex construction projects.

C. Mechanical Contractors Association of America

The Mechanical Contractors Association of America ("MCAA"), with over 2,100 member companies in the U.S., is the leading employer trade association in the complex mechanical systems installation and service sectors of the construction industry. MCAA member companies install, service and maintain mechanical, piping, plumbing and refrigeration systems of all types in industrial, commercial, institutional, and residential facilities for both public agency and private sector clients. Members of the MCAA routinely work on projects covered by PLAs, and they have an interest in the continued availability of PLAs on complex projects.

STATEMENT OF THE CASE

This case arises from President George W. Bush's issuance of Executive Order No. 13202 (2001) which prohibits, in all instances, construction managers acting on behalf of a federal entity, or an entity receiving federal funding, from negotiating project labor agreements ("PLAs"), even in instances where the use of a PLA would financially benefit the federal government or the entity receiving federal funding. The wholesale prohibition of PLAs resulting from Executive Order No. 13202 not only hampers the ability of private construction managers to negotiate the most financially and operationally beneficial contract for the federal agency or the recipient of federal funding, but also dramatically decreases the efficiency and cost-effectiveness with which contractors represented by the *amici curiae* can complete large complex construction projects.

A. Benefits of Project Labor Agreements

Owners, both public and private, involved in major construction projects, as well as the construction managers they hire and the contractors who ultimately perform the work, have long recognized PLAs as useful tools in completing projects on time and cost-effectively. This Court identified the often cited benefit of PLAs in its *Boston Harbor* decision, stating, "Kaiser suggested to MWRA that Kaiser be permitted to negotiate an agreement with the Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project." *Building and Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island ("Boston Harbor")*, 507 U.S. 218, 221 (1993). A single PLA operates to cover all of the contractors, unions, and employees involved on the construction

project, with resulting uniformity on important issues, including working hours, overtime, and holidays. PLAs are also advantageous insofar as they contain dispute resolution mechanisms and no-strike clauses that prohibit work stoppages during the entire duration of the PLA. Thus, the use of a PLA on a complex project ensures that the contractors will not face work stoppages due to the expiration of either the collective bargaining agreement between themselves and their respective unions, or the expiration of a labor agreement in a different trade which could lead to a project-wide sympathy strike, lockouts, other work stoppages, and costly delays.

Practical examples illustrate the benefits of PLAs for the contractors represented by the *amici curiae*. Complex construction projects require the services of numerous different trades. Given the number of trades associated with any multi-year project, the expiration of one or more of the contracts remains unavoidable during the term of the project.[2] Without a PLA, the expiration of each contract would mean the possibility of a work stoppage for that trade and a corresponding sympathy strike by the other trades, all of which would result in significant delays for all of the contractors on the project. The existence of a PLA eliminates the inefficiencies associated with the constant threat of, or actual, work stoppages. While working under a standard PLA, each trade is allowed to negotiate its contract in

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[2] *See John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955 (Mass. 1999) (Court upheld PLA where mayor testified that at least twenty-five labor contracts would expire during the course of a school construction project); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnetonka Indep. School District No. 276*, 1999 WL 1261743 (Minn. Ct. App. Dec. 28, 1999) (Court upheld PLA where construction manager notified school district that approximately eighteen of twenty-seven construction trade union contracts would expire during the term of a school construction project).

the event it expires during a project, but the union is not allowed to strike the project covered by the PLA. Upon completion of the negotiations for a new contract, the union and the contractor generally apply the new terms retroactively. Thus, the union employees realize the benefits of the new contract, while the contractor (plus the owner and all other contractors) do not face the risk of a project-wide work stoppage.

A PLA also establishes a uniform dispute resolution system and requires that each trade subject itself to the jurisdiction of a single chosen neutral. Without a PLA, each job would be subject to multiple contracts with multiple trades, each of which could designate a different dispute resolution system. Without a PLA, no effective means exists for resolving competing claims between rival unions seeking the same work assignment. Under a PLA, on the other hand, all contractors from all trades subject themselves to a single dispute resolution system, resulting in an outcome that binds all affected parties.

In addition to the possible major delays that could arise from a project-wide work stoppage, project labor agreements also afford relief from constant inefficiencies that result from nonuniform working hours. Even a one-half hour difference in working hours during the course of a multi-year project can cause considerable delay and expense, which will be born either by the public entity financing the project or by the contractor.

B. Statutory Authority for Project Labor Agreements

Congress, likewise, recognized the benefits of PLAs and the unique aspects of the construction industry when it amended the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, in 1959 by adding Section 8(e) and (f), which allow construction industry employers to enter into contracts with

unions prior to actually hiring employees. Generally under the NLRA, a group of currently employed workers would seek representation from a union, which, following an affirmative vote, would represent the employees in negotiating a contract with their employer. As this Court has recognized, however, the construction industry demands a different regimen, because of "the short-term nature of the employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long standing custom of prehire bargaining in the industry." *Boston Harbor*, 507 U.S. at 231. Thus, Congress enacted Section 8(f), which allows a contractor to negotiate with a union for a contract (a prehire agreement) prior to the contractor hiring its employees.

Section 8(e) takes the concept of a prehire agreement one step further, allowing a construction manager hired by the public or private owner to enter into an agreement with all of the contractors or subcontractors on a single job, thereby ensuring uniformity in all important terms of the contracts.[3] Without such an agreement, all union and nonunion contractors would work under their own contract terms or company rules and policies.

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[3] Congress intended to allow project labor agreements pursuant to Section 8(f). The typical PLA is made expressly available to union and non-union contractors on exactly the same terms. A number of courts have rejected claims that PLAs are impermissibly preclusive. *See, e.g., Associated Builders & Contractors, Inc. v. Southern Nevada Water Auth.*, 979 P.2d 224, 230 (Nev. 1999); *New York State Chapter, Inc. v. New York State Thruway Auth.*, 666 N.E.2d 185, 191-92 (N.Y. 1996); *Utility Contractors Ass'n of New England, Inc. v. Massachusetts Dep't of Public Works*, 5 Mass. L. Rptr.17, No. Civ. A. 90-3035, 1996 WL 106983 (Mass. Super. Mar. 12, 1996); *State ex rel. Associated Builders & Contractors v. Jefferson County Bd. of Comm'rs*, 665 N.E.2d 723, 726-27 (Ohio App. 1995); *see also Associated Builders & Contractors, Inc. v. San Francisco Airport Comm'n*, 981 P.2d 499, 506-14 (Cal. 1999).

C. The Effect of Executive Order No. 13202

Despite Congress' unambiguous intent to allow construction managers to use PLAs for the benefit of both public and private owners as well as contractors and employees who work on complex construction projects, President Bush issued Executive Order No. 13202, in an effort to regulate (and unilaterally amend) national labor relations policy. Executive Order No. 13202 will have an immediate negative effect not only on the federal agencies and recipients of federal funding who deem PLAs an efficient tool in complex construction projects, but also the more than 25,000 contractors represented by the *amici curiae*, who rely on the benefits of PLAs when bidding and performing work on complex construction projects.

Executive Order No. 13202 effectively precludes the use of PLAs on all federally funded construction projects.[4] By its terms, Executive Order No. 13202 explicitly prohibits federal agencies or recipients of federal funding (or their private construction managers) from requiring that a contractor bidding on a job submit itself to a PLA as part of the bid. The Executive Order provides, in relevant part:

> Section 1. To the extent permitted by law, any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Government authority

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[4] According to data by the federal government, state agencies in 2000 received approximately $24.4 billion from the federal government, via the Highway Trust Fund ($23.9 billion) and other funds ($519 million), to use in connection with construction and maintenance of state highways. *See* "Funding for Highways and Disposition of Highway User Revenues, All Units of Government, 2000." http://www.fhwa.dot.gov/ohim/hs00/hf10.htm

nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:

(a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or

(b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

* * *

Sec. 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1(a) or (b) of this order.

Thus, by Executive Order No. 13202, the President has effectively prohibited federal agencies, recipients of federal funding, private construction managers, contractors, and unions from exercising the rights granted to them by the National Labor Relations Act upheld by this Court in *Boston Harbor*.

Section 1(c) of Executive Order No. 13202, however, seems to allow a federal agency or federally funded state or local agency to voluntarily enter into a PLA after it receives bids, but before it commences work on a project. But the realities of the construction industry and the public bidding process prevent the construction managers from exercising the illusory liberty granted by Section 1(c). Almost without exception, public bidding laws require that the public entity let the construction contracts directly to the contractors rather than through private construction managers, thereby requiring the public entity seeking to use a PLA to include a PLA requirement in its bid specifications. Thus, by preventing a publicly funded entity from requiring adherence to a PLA in its bid specifications, Executive Order No. 13202 effectively prohibits the use of PLAs in federally funded construction projects, even in those instances where the owner, the construction manager, and the contractors all stand to benefit from their use.

SUMMARY OF ARGUMENT

Executive Order No. 13202 is a regulatory rather than a proprietary act because it is a blanket rule based upon labor concerns rather than incentives embraced by a typical proprietor. As a regulatory act, Executive Order No. 13202 is invalid because it is preempted by the NLRA under both *Garmon* and *Machinists* preemption principles.

ARGUMENT

A. Introduction

An Executive Order that conflicts with the NLRA is invalid, since it is preempted by federal statute. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-34 (D.C. Cir. 1996). The central question, therefore, is whether Executive Order No. 13202 violates NLRA preemption principles. But in order for there to be preemption, it must be the case that Executive Order No. 13202 constitutes a regulatory act rather than a proprietary one. *Boston Harbor*, 507 U.S. at 227, 229-30.

B. The D.C. Circuit Court's Conclusion That Executive Order No. 13202 Is Proprietary Rather than Regulatory Is Inconsistent With *Boston Harbor*.

The D.C. Circuit's decision ignores the regulator/proprietor dichotomy embraced by this Court in *Boston Harbor*. In *Boston Harbor*, the Court first recognized that both public and private entities could, in effect, "regulate" by exercising their purchasing power in a particular manner. As the Court stated:

> The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor . . . . Private actors therefore

> may "regulate" as they please, as long as their conduct does not violate the law.

This Court then recognized the important distinction between a public actor and a private actor, stating:

> When the State acts as a regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as a regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.

Boston Harbor, 507 U.S. at 229.

In recognizing that both private and public actors can regulate through their participation in the market, this Court did not draw a bright line between employer conduct unrelated to the employer's performance of contractual obligations to the government and employer conduct related to the employer's performance of contractual obligations. Indeed, the example used by this Court of a private actor attempting to "regulate" an employer by boycotting the employer because of its labor policy did not distinguish between whether the labor policy in question related to the performance of the employer's obligations to the purchaser. Thus, the bright-line rule advanced by the government and adopted by the D.C. Circuit does not reflect this Court's *Boston Harbor* opinion. To the extent that this Court adopted any bright line rule, the bright line distinguished between acts motivated by profit (which constitute pure proprietary act) and acts motivated by labor policy or other policy concerns (which constitute regulation).

Moreover, in *Boston Harbor*, this Court considered additional factors when determining that the MWRA's exercise of its purchasing power did not constitute regulation. Specifically, the Court considered the fact that the MWRA acted on the advice of a manager hired to organize performance of the job; that MWRA was attempting to insure an efficient project that would be completed quickly and cost effectively; and that MWRA's actions were "specifically tailored to one particular job, the Boston Harbor cleanup project." *Boston Harbor*, 507 U.S. at 232. The Court concluded that "[t]here is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as legitimate." *Id.*, *citing*, *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 662 (1982).

The D.C. Circuit Court, on the other hand, did not consider the various factors relied upon in *Boston Harbor* when determining that the MWRA's actions constituted non-regulatory market activity. The D.C. Circuit ignored the fact that the President did not rely upon the advice of a manager hired to organize one or more complex projects when issuing Executive Order No. 13202. Further, the D.C. Circuit ignored that the President intended to ensure "Open Competition and Government Neutrality" in the bidding process rather than ensure an efficient project that would be completed as quickly and cost effectively as possible. Finally, the D.C. Circuit failed to consider that the Executive Order was not tailored to one particular job but, instead, applied to literally thousands of federal projects and federally funded projects involving billions of construction dollars.

Executive Order No. 13202, on its face, seeks to do more than simply ensure that which a normal market participant seeks to ensure, namely a reduction in construction costs to the federal

government and to the taxpayers. By its express terms, Executive Order No. 13202 goes much further by seeking to:

1. Promote and ensure open competition on Federal and federally funded or assisted construction projects;
2. Maintain Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects;
3. Reduce construction costs to the Federal Government and to the taxpayers;
4. Expand job opportunities, especially for small and disadvantaged businesses; and
5. Prevent discrimination against Government contractors or their employees based upon labor affiliation or lack thereof.

The "typical proprietor" used by this Court as an example in *Boston Harbor* would not attempt to achieve anything other than reducing construction costs. Anything more would constitute "regulation" by either a private or public proprietor. Unlike *Boston Harbor*, where the Court found "no basis on which to distinguish the incentives at work [there] from those that operate elsewhere in the construction industry," 507 U.S. 232, the incentives at work in Executive Order No. 13202 (competition, neutrality, expansion of job opportunities for small disadvantaged businesses and prevention of discrimination) do not operate elsewhere in the construction industry. Rather, such incentives appropriately form the basis of government regulation.

C. Accepting That Executive Order No. 13202 Is Regulatory, Then It Must Be Deemed Invalid Under *Garmon* and *Machinists* Preemption Principles.

As described in *Boston Harbor*, the Supreme Court has developed two sets of NLRA preemption principles. *Garmon* preemption prohibits regulation of activities that are arguably subject to §7 or §8 of the National Labor Relations Act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *Machinists* preemption prohibits government regulation of areas Congress intended to be left "unregulated and . . . controlled by the free play of economic forces." *Machinists Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976). The Court of Appeals failed to consider whether the Executive Order is preempted by the National Labor Relations Act under *Garmon* or *Machinists*, since it concluded that the Executive Order constitutes proprietary action rather than regulation. As argued above, this underlying conclusion was erroneus and, therefore, the preemption issue must be considered.

With respect to *Garmon* preemption, the District Court held:

> Executive Order No. 13202 does not violate the *Garmon* preemption rule with respect to federally-funded construction projects conducted by public entities. However, Executive Order No. 13202 does violate *Garmon* preemption with respect to federally-funded projects conducted by private employers.

Thus, the District Court concluded that Executive Order No. 13202 is invalid under *Garmon* preemption only insofar as it extends to private recipients of federal funding. The District Court, however, concluded that *Machinists* preemption has a broader effect, holding that Executive Order No. 13202 violates the *Machinists* preemption doctrine for both construction conducted by federal agencies *and* construction by recipients of federal funding.

1. Executive Order No. 13202 is Invalid Under *Garmon* Preemption Principles.

As noted above, the District Court concluded that the Executive Order is invalid under the *Garmon* preemption doctrine, but only to the extent it applies to recipients of federal funding. The District Court was correct in concluding that *Garmon* preemption invalidates the Executive Order as it applies to recipients of federal funding. However, the District Court erred by concluding that the Executive Order is valid under *Garmon* to the extent that public owner-developers are concerned.

a. The District Court correctly concluded that Executive Order No. 13202 is invalid insofar as it applies to private recipients of federal funding.

Section 8(f) of the NLRA, 29 U.S.C. §158(f), clearly protects the use of PLAs by private employers. Yet the Executive Order purports to prohibit private employers from exercising their rights under the NLRA to negotiate pre-hire collective bargaining agreements that apply to an entire construction project. Because the Executive Order infringes upon private employers' rights under §8(f) to use PLAs, *Garmon* preemption is unquestionably implicated.

b. The District Court erroneously concluded that Executive Order No. 13202 does not violate the *Garmon* preemption principle with respect to construction projects that are conducted by public entities.

According to the District Court, public entities are not "employers" covered by §8(f), and, therefore, the Executive Order is not implicated by *Garmon* preemption to the extent it prohibits PLAs on projects conducted by public entities. In reaching this conclusion, the District Court ignored the role of construction managers, and failed to recognize their right to determine what system of labor relations will work best for any given construction project. The Executive Order, by its express terms, prohibits construction managers — "employers" under §2(2) of the NLRA — from entering into PLAs on behalf of federal agencies and recipients of federal funding. It does not matter whether a private construction manager is acting on behalf of a private or public employer; in either case, the construction manager is an "employer" under the NLRA. *Management Training Corp.*, 317 NLRB 1355, 1358 (1995); *NLRB v. YWCA of St. Louis*, 192 F.3d 1111, 1117-18 (8th Cir. 1999); *Aramark Corp. v. NLRB*, 179 F.3d 872, 874-78 (10th Cir. 1999); *Pikeville United Methodist Hosp. v. United Steelworkers*, 109 F.3d 1146, 1151-52 (6th Cir. 1997); *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56, 59 (4th Cir. 1997). Insofar as Executive Order No. 13202 purports to prohibit private construction managers from entering into PLAs, it is preempted under the principles of *Garmon*. The Executive Order is invalid even as to public owner-developers because it unquestionably interferes with private construction managers' ability to exercise their right to use a PLA.

Lest there be any doubt, it is extremely significant to note that, in *Boston Harbor*, the private construction manager — Kaiser Engineers, Inc. — suggested the use of the PLA and negotiated its terms. 507 U.S. at 221. The Court characterized the MWRA's use of a PLA as promoting the legislative goals of §8(f). Yet, if Executive Order No. 13202 would have been in effect at the time of *Boston Harbor*, it would have prohibited Kaiser from pursuing its chosen system to manage labor relations on the project.

In short, a construction manager — a private employer under NLRA §2(2) — should not be deprived of its right under §8(f) to pursue a PLA, just because it happens to be managing a public project, rather than a private project. Public entities hire project managers in order to take advantage of their expertise. If the construction manager recommends — after surveying the project, looking at the crafts, and considering the phases of the project — that a PLA would be advantageous, it is foolish to say that the project manager's advice cannot be followed. This is particularly true since private owners can use PLAs. It makes no sense to prohibit federal agencies acting as market participants from taking advantage of a useful tool that is available to private owners, and such a restriction is preempted under *Garmon*.

2. Executive Order No. 13202 Is Invalid Under *Machinists* Preemption Principles, as the District Court properly found.

The District Court properly concluded that Executive Order No. 13202 is preempted by the NLRA under the *Machinists* doctrine, both as to recipients of federal funding *and* federal agencies. As noted by the District Court, *Machinists* preemption is implicated because Executive Order No. 13202

was intended to create an ideally balanced state of bargaining, according to the President's notion of open competition. Pursuant to *Machinists*, whether or not a PLA is negotiated and used must be left to the forces of the free market. The Executive Order, by prohibiting federal agencies and recipients of federal funding from using PLAs, collides head first with this principle.

As noted by the District Court, Executive Order No. 13202 has the effect of denying an *option* to public owner-developers that is available to private owner-developers. Insofar as the Executive Order operates to deny public owner-developers the ability to use PLAs, it is clearly regulating a decision that must be left to market forces. There can be no question that PLAs can benefit owner-developers. As discussed above, a PLA is the only way to establish uniform working hours, overtime policies, holidays, etc. And a PLA is the only way to ensure that no strikes will plague a lengthy construction project. Clearly, PLAs can be valuable tools for owner-developers. The Executive Order, insofar as it deprives public owner-developers the right to a benefit enjoyed by private owner-developers, must be deemed invalid.[5] The rule purports to be neutral with respect to PLAs, but clearly it is not.

To the extent that the Executive Order prohibits owner-developers and labor organizations from negotiating PLAs, it clearly disrupts the economic balance between management and labor. This prohibition violates the fundamental precept of *Machinists* preemption, insofar as it unquestionably constitutes "regulation of areas Congress intended to be left 'unregulated and . . . controlled by the free play of economic forces.'" *Reich*, 74 F.3d at 1334, *quoting from Machinists Lodge 76*, 427 U.S. at 144. "No state or federal official or government entity can alter

[5] Of course, the Executive Order's interference with free market forces is also felt by labor organizations who wish to negotiate PLAs.

the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Id.* at 1337. Quite simply, "*Machinists* preemption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor*, 507 U.S. at 226 (internal quotation marks omitted). Here, as noted by the District Court, the Executive Order interferes with the balance of economic and bargaining power established by the NLRA, and, for that reason, it is invalid under *Machinists* preemption.

CONCLUSION

Based upon the foregoing, the Court should grant Petitioners' Petition for a Writ of Certiorari.

Dated: December 10, 2002

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IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* NORTH AMERICAN CONTRACTORS ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* NORTH AMERICAN CONTRACTORS ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST [1]

The North American Contractors Association ("NACA") is a voluntary organization of national construction and maintenance contractors who are engaged in major construction

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part and that no one other than *amicus*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

projects, including public and private construction, heavy and highway construction, and maintenance work, totaling in excess of $25 billion per year.[2] NACA was formed to develop and negotiate innovative national and project-specific labor agreements on behalf of its member companies. NACA members both manage other contractors and engage in direct-hire construction under project labor agreements ("PLAs") across the country, on behalf of public as well as private owners.

NACA members have performed billions of dollars of work on federally funded construction projects, and have found that PLAs are a valuable and sometimes indispensable tool for managing large federal construction projects. The use of PLAs on federally funded construction projects dates back to the Grand Coulee Dam in 1938, and various atomic energy and defense construction projects during and after World War II. *See* U.S. General Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information* 4 (1998). PLAs have been used on many major federally funded projects since then, such as Cape Canaveral, the Trans-Alaska Pipeline, the Boston Harbor cleanup, the Central Artery/Tunnel ("Big Dig") project in Boston, the Denver International Airport, the Oak Ridge Reservation in Tennessee, the Tennessee Valley Authority, the Nevada Test Site, and the National Ignition Facility at the Lawrence Livermore National Laboratory. *See id.* at 4, 9 & 25-26.

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[2] NACA members include the following: Bechtel Construction Company, Black & Veatch Construction, Inc., Dillingham Construction, Fluor Constructors International Inc., Fluor Nuclear Services, GAICO, Inc., J.A. Jones Construction Company, Jacobs Constructors, Inc., Kiewit Industry Co., Leonard Construction Company, NPS Energy Services, Inc., Oscar J. Boldt Construction, Parsons Construction Inc., Power Maintenance & Constructors, North American Energy Services, Washington Group, Stone & Webster Construction Co., Inc., Utility Resources, Inc., Sachs Electric Company, Babcock & Wilcox Construction Company, Inc., Murphy Industrial Constructors, and Graycor Industrial Constructors, Inc.

Executive Order No. 13,202 denies construction managers on federally funded projects, many of whom are NACA members, the ability to use PLAs on appropriate projects. While a PLA may not be necessary or useful on every federal project, there are many projects—particularly large-scale, complex, and time-sensitive projects—which could be completed more effectively and efficiently through the use of a mandatory, project-wide PLA. By removing this important project management tool from the arsenal of federal construction managers, the Executive Order will make it more difficult for NACA members to complete major federal projects on budget and on time. For these reasons, NACA is keenly interested in the questions presented in this petition, and urges the Court to grant the petition.

SUMMARY OF THE ARGUMENT

NACA, as an association of national construction contractors and managers, believes it is uniquely qualified to comment on two aspects of the questions presented in this case. First, as to the effect of Executive Order No. 13,202, NACA takes issue with the D.C. Circuit's conclusion that the Executive Order "does not prohibit a contractor or a subcontractor from entering into a PLA . . . it merely prevents the contracting authority from either requiring or forbidding the use of a PLA for a project." *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002). This is a naïve and unrealistic premise of the court's decision, and it reflects a fundamental misunderstanding of PLAs and construction industry labor relations.

Simply put, a PLA is effective only if all contractors and subcontractors working on the project are required to be bound by it. Discretionary application of a PLA, based on the individual desires and interests of each contractor on the project, would negate the essential utility of a PLA. A PLA is useful because it standardizes terms and conditions of

employment across an entire project, provides contractors a steady supply of skilled labor, guarantees against strikes or work stoppages during the life of the project, and establishes a uniform procedure for any and all labor disputes arising on the project. The Executive Order deprives federal agencies and construction managers of this valuable tool for managing large, complex, and time-sensitive projects which typically involve fifteen or more independent trade unions.

Second, NACA disagrees with the D.C. Circuit's conclusion that the Executive Order was a proprietary rather than regulatory act. This conclusion is based on the highly questionable assumption that the Executive Order's categorical ban on the use of PLAs, regardless of the size, scope, or location of the project, is consistent with the approach of a private sector construction manager or proprietor. *See Allbaugh*, 295 F.3d at 35 (finding no "good explanation" as to why the Executive Order "is somehow inconsistent with the action of a proprietor"). Based on the collective experience of its members, NACA can attest that such a categorical refusal to even consider the use of PLAs on certain projects is not an economically rational proprietary decision. Rather, the Executive Order's absolutist approach suggests philosophical and policy-driven motivations which have little to do with the government's proprietary interests on a given project.

The Executive Order should accordingly be treated as a regulatory action subject to normal preemption principles. Even though the Executive Order applies only to federally funded construction projects, and thus is nominally "proprietary" in nature, it is truly a proprietary act that is, in the words of this Court, "tantamount to regulation." *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 289 (1986). The D.C. Circuit's decision fails even to consider this Court's decision in *Gould*, and it misinterprets this Court's decision in *Building & Constr. Trades Council v. Associated Builders & Contractors ("Boston Harbor")*, 507 U.S. 218 (1993). The

D.C. Circuit's decision is also inconsistent with the decisions of other circuit courts, and even with one of its own prior decisions, which have properly interpreted and applied *Boston Harbor* and *Gould*. Given this inconsistency between the D.C. Circuit's approach in this case and the law as articulated by this Court and several other circuit courts, the decision below merits review by this Court.

ARGUMENT

I. THE EXECUTIVE ORDER PROHIBITS THE EFFECTIVE USE OF PLAS ON FEDERALLY FUNDED CONSTRUCTION PROJECTS.

Executive Order No. 13,202 deprives federal agencies and construction managers of the ability to use PLAs in any effective way, by forbidding them from requiring contractors and subcontractors to adhere to the PLA as a condition of doing work on the project. The Executive Order provides, in relevant part, as follows:

> Section 1. To the extent permitted by law, any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Government authority nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:
>
> (a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or
>
> (b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

> (c) Nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection (a).
>
> * * *
>
> Section 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1 (a) or (b) of this order.

Although the Executive Order permits contractors or subcontractors on federal projects to "voluntarily" enter into a PLA, the key prohibition is that a federal agency or a construction manager acting on the agency's behalf may not *require* adherence to a PLA (or any other labor agreement) as a condition of bidding on or performing work on the project.

This prohibition deprives federal construction managers of a right granted by the National Labor Relations Act ("NLRA"). As this Court held in *Boston Harbor*, Sections 8(e) and 8(f) of the NLRA authorize employers in the construction industry to enter into a PLA which can be required of all contractors and subcontractors working on the project. *Boston Harbor,* 507 U.S. at 230 (finding that Sections 8(e) and 8(f) "explicitly authorize this type of contract"). Section 8(f), 29 U.S.C. § 158(f), specifically permits employers in the construction industry to enter into prehire collective bargaining agreements, such as PLAs. The construction industry proviso to Section 8(e), 29 U.S.C. § 158(e), permits a construction industry employer to require all of its contractors and subcontractors to agree to

become bound by a labor agreement as a condition of performing work on a construction project.

The rights provided by Sections 8(e) and 8(f) of the NLRA enable contractors and construction managers to fix their labor costs before work begins on a project, and otherwise provide some measure of employment stability. The intent of these provisions is clear from the face of the statute as well as its legislative history, as this Court found in *Boston Harbor*:

> It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry.

Boston Harbor, 507 U.S. at 231.

By forbidding federal construction managers from exercising their lawful right to require all contractors and subcontractors to agree to a PLA before starting work on the project, the Executive Order robs the PLA of all meaningful utility. A PLA is effective only if it is required as a condition receiving an award of work on the project. The General Accounting Office, in its 1998 report on the use of PLAs on federal construction projects, recognized that among the characteristic provisions of a PLA is the requirement that all contractors and subcontractors must become signatory to the PLA:

> Their provisions generally (1) apply to all work performed under a specific contract or project, or at a specific location; (2) require recognition of the signatory unions as the sole bargaining representatives for covered workers, whether or not the workers are union members;

> (3) supersede all other collective bargaining agreements; (4) prohibit strikes and lockouts; (5) require hiring through union referral systems; (6) *require all subcontractors to become signatory to the agreement*; (7) establish uniform work rules covering overtime, working hours, dispute resolution, and other matters; and (8) prescribe craft wages, either in the body of the agreement or in an appendix or attachment.

U.S. General Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information* 4 (1998) (emphasis added).

Indeed, the D.C. Circuit in its decision below likewise acknowledged that a PLA "typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement." *Allbaugh*, 295 F.3d at 30. *See also Boston Harbor*, 507 U.S. at 222 (noting requirement in PLA that "all contractors and subcontractors agree to be bound by the Agreement").

It is thus undisputed that one of the fundamental terms of a PLA is the requirement that all contractors and subcontractors agree to be bound by the agreement as a condition of performing work on the project. The Executive Order clearly forbids this essential and perfectly lawful requirement on federal construction projects, thereby undermining the basic purpose of a PLA. Yet, the D.C. Circuit seemed to underestimate the impact of the Executive Order when it noted that the Order "does not prohibit a contractor or subcontractor from entering into a PLA . . . it merely prevents the contracting authority from either requiring or forbidding the use of a PLA for a project." *Allbaugh*, 295 F.3d at 30. The court apparently believed that, despite the Executive Order, PLAs would continue to be utilized on federal construction projects, albeit on a voluntary basis: "§ 1 [of the Executive Order] leaves contractors free to determine whether they will use PLAs on government contracts . . . ." *Id.* at 35.

The reality is that there is little or no incentive to negotiate or use a PLA on a federal project if the agency or its construction manager cannot require all contractors working on the project to be bound by the PLA before starting work on the project. PLAs are useful precisely because they establish uniform working conditions across an entire project, guarantee against strikes or work stoppages by any signatory union during the life of the project, and provide a comprehensive procedure for the resolution of any and all labor disputes arising on the project.

If contractors working on the project are permitted to opt out of the PLA, at their discretion, and instead apply their own labor agreements or unilaterally established terms and conditions of employment, the benefits of uniformity are obviously lost. Work on the project could be hindered or interrupted by conflicting work rules, jurisdictional disputes between the fifteen or more trade unions on the site, and strikes resulting from those disputes and from negotiations over each individual collective bargaining agreement being applied on the project. *See, e.g., Phoenix Eng'g. Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1514-15 (6th Cir. 1992) (noting that PLA was negotiated for federal project at Oak Ridge nuclear facility after strike occurred following expiration of labor agreement applied on site).

Moreover, allowing contractors to wait and decide whether they will sign on to the PLA after they begin performing work on the project also defeats one of the main purposes of the PLA: by establishing a uniform set of wage rates, benefits, and working conditions, the PLA allows the project owner, as well as contractors, to more easily predict their labor costs before work on the project begins. If, however, contractors apply their own labor agreements with varying wage and fringe benefit rates and other working conditions—all of which may be subject to renegotiation during the term

of the project—then the task of projecting overall labor costs for the project becomes much more difficult, if not impossible.

Thus, the Executive Order's promise of discretionary PLAs is an illusory promise; in reality, the Executive Order amounts to an outright ban on the effective use of PLAs on federally funded projects. As such, it directly interferes with the right of federal contractors and construction managers to enter into such agreements, pursuant to Sections 8(e) and 8(f) of the NLRA. Federal agencies and recipients of federal funds are thereby deprived of a uniquely effective tool for managing multi-union labor relations, predicting labor costs, resolving disputes, and preventing strikes and other disruptions of work on major construction projects.

II. THE EXECUTIVE ORDER MUST BE VIEWED AS A REGULATORY ACT SUBJECT TO NLRA PREEMPTION.

While the Executive Order plainly conflicts with the lawful exercise of rights afforded by the NLRA, the D.C. Circuit avoided the preemption issue by deeming the Executive Order to be a proprietary rather than regulatory act. *See Allbaugh*, 295 F.3d at 35-36. The D.C. Circuit's application of the regulatory/proprietary distinction in this case is highly problematic, because it expands the scope of proprietary governmental conduct—*i.e.*, conduct exempt from preemption analysis—to encompass what must be viewed as an inherently policy-driven decision implemented through the power of the federal purse. This expansive interpretation of the scope of proprietary conduct is in conflict with this Court's decisions in *Gould* and *Boston Harbor*, and with the decisions of other circuit courts.

The definition of proprietary conduct articulated by the D.C. Circuit in this case gives the Executive Branch license to interfere with rights conferred by the NLRA (and presumably

other federal statutes), so long as the reason for interference bears some relation to work which is performed for the federal government or on projects at least partially financed with federal funds. *See Allbaugh*, 295 F.3d at 36 ("Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'"). This loose standard allows the Executive Branch to override or ignore federal statutory law in those substantial sectors of the U.S. economy which are devoted to federally funded work.

Such a broad interpretation of the scope of proprietary conduct is inconsistent with this Court's holdings in *Gould* and *Boston Harbor*. In *Gould*, this Court held that the NLRA preempted a Wisconsin procurement statute which debarred contractors that had been found to have violated the NLRA three times in a five-year period. The state argued that its action was exempt from NLRA preemption analysis because the statute was an exercise of the state's spending power rather than its police power. That argument was rejected, however: "by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services' . . . for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Gould*, 475 U.S. at 289 (citation omitted).

In *Boston Harbor*, by contrast, this Court held that the Massachusetts Water Resources Authority's decision to use a PLA for the Boston Harbor cleanup project was proprietary conduct immune from NLRA preemption. The state agency's decision in *Boston Harbor* was, unlike the statute in *Gould*, "specifically tailored to one particular job." *Boston Harbor*, 507 U.S. at 232. Thus, there was "no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Ibid. See also Phoenix Eng'g*, 966 F.2d at

1524 (holding that PLA entered into on behalf of Department of Energy was proprietary rather than regulatory in nature).

Prior to its decision in *Allbaugh*, the D.C. Circuit interpreted *Boston Harbor* to give rise to a clear distinction between government procurement action "seeking to set general policy" and a governmental entity which is "just trying to operate as if it were an ordinary general contractor whose actions [a]re 'specifically tailored to one particular job'". *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1336-37 (D.C. Cir. 1996). Based on this distinction, the D.C. Circuit in *Reich* opined that Executive Order 12,818, which was promulgated by President George H. W. Bush and which contained virtually the same prohibitions as Executive Order 13,202, did not meet the *Boston Harbor* standard for proprietary conduct:

> [W]e very much doubt the legality of President Bush's Executive Order 12,818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements under § 8(f).

Id. at 1337. It is obviously difficult to reconcile this conclusion with the D.C. Circuit's subsequent holding in *Allbaugh*.

Other circuit courts have adopted a more narrow conception of proprietary conduct within the meaning of *Boston Harbor* and *Gould*. The Fifth Circuit, for instance, has articulated the following standard under *Boston Harbor*:

> [T]he key under *Boston Harbor* is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general

> policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999). This approach has been cited with approval in other circuits. *See, e.g., Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002); *Petrey v. City of Toledo*, 246 F.3d 548, 556-57 (6th Cir. 2001).

The Fifth Circuit's analysis appropriately reconciles the distinctions drawn by this Court in *Boston Harbor* and *Gould*, whereas the D.C. Circuit's approach in *Allbaugh* utterly fails to account for the rule enunciated in *Gould*: government procurement action, although proprietary in form, may be "tantamount to regulation." *Gould*, 475 U.S. at 289. As this Court explained in *Gould*, "we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' . . . under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959)). NLRA preemption therefore must reach purely proprietary conduct that is essentially regulatory in purpose or effect.

Executive Order 13,202 plainly does not meet the standard of *Boston Harbor* and *Gould*. This conclusion is made apparent through application of the standard articulated by the Fifth Circuit in *Cardinal Towing*. First, the Executive Order does not address the federal government's "own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances." *Cardinal Towing*, 180 F.3d at 693. Given the federal government's longstanding and successful experience with PLAs on major federal con-

struction projects, it is very difficult to see how the Executive Order's categorical ban on the use of PLAs on federally funded projects was an action motivated by an objective interest in the "efficient procurement of needed goods and services." If the government were truly interested in the "efficient procurement of needed goods and services," it would, at a minimum, continue to permit the use of PLAs on those types of projects on which they have been used with great success in the past. In particular, the government would continue to permit the use of PLAs on large-scale and time-sensitive projects, and/or on projects located in labor markets with high union density and thus a high potential for strikes and other labor disruptions. That the Executive Order categorically precludes the use of PLAs even on these types of projects strongly suggests that the Executive Order is motivated by regulatory, rather than proprietary, interests.

For the same reason, the Executive Order also does not meet the second prong of the Fifth Circuit's analysis: the Executive Order is not so narrow in scope as to "defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693. The Executive Order, unlike the action of the Massachusetts Water Resources Authority in *Boston Harbor*, is not "specifically tailored to one particular job." *Boston Harbor*, 507 U.S. at 232. Nor is it even tailored to certain types of federal construction projects on which PLAs are traditionally not used or have not proven to be useful. The Executive Order instead prohibits the effective use of PLAs on all federally funded projects, without any meaningful exception.[3] Even if a federal con-

[3] Section 5 of the Executive Order permits an exception if the head of a federal agency finds that "special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security." This is plainly a very narrow exception, and it does not allow for exceptions based on considerations of efficiency, economy, or

struction manager (such as one of NACA's members) could make a compelling economic argument for using a PLA on a particular project, the Executive Order nevertheless forbids its use or even its practical consideration.

Furthermore, there is no doubt that, in addition to construction projects undertaken directly by the federal government, the Executive Order has an impact on countless State, local, and independent government agency projects. To hold that an order which directly limits the labor relations options of such third party entities is "proprietary" in nature is to exalt form over substance in the extreme.

Given the Executive Order's far-reaching scope, it must be concluded that the Order is motivated, at least in part, by a "regulatory impulse." *Cardinal Towing*, 180 F.3d at 693. Accordingly, the Executive Order cannot properly be exempted from preemption analysis under the NLRA. To allow the D.C. Circuit's decision to stand would permit a dramatic expansion of the proprietary exception adopted by this Court in *Boston Harbor*, and it would sanction future efforts by the Executive Branch to invoke the power of the purse as a basis for intruding into areas regulated by the NLRA and other federal statutes.

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on-time completion—considerations that are fundamentally proprietary in nature. In fact, the prohibition on consideration of the potential for strikes or labor disruptions as a basis for an exception, an important subject for any construction owner or manager, is proof positive of the Executive Order's true regulatory character.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 02-527

IN THE
Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF THE STATES OF MARYLAND, COLORADO, MAINE, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, WASHINGTON, AND WEST VIRGINIA, AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the President have the authority, by executive order, to preclude a State from utilizing a pre-hire labor agreement as a bid specification in all federally assisted State construction contracts, without regard to the State's circumstances, when Congress has authorized both the type of specification and the ability of the federal-aid agency to review specifications on a contract-by-contract basis?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioners.

INTEREST OF *AMICI CURIAE*

The States have a distinct and substantial interest in the outcome of this case. Executive Order 13202's blanket prohibition against the States' use of a pre-hire labor agreement as a bid specification in all federally assisted construction contracts strips the States of a valuable labor relations tool in managing and implementing billions of dollars of transportation, housing, and other State-sponsored projects.

Such an agreement, known more commonly as a Project Labor Agreement (PLA), has become an important vehicle for labor relations management on public projects. PLAs ameliorate the frictions identified by this Court in *N.L.R.B. v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951), that can arise where union and non-union workers may be working at the same site. They bring stability and predictability to the execution of the work ensuring continuation of work when local bargaining strikes occur, and they assure an adequate supply of skilled labor to perform the work competently and expeditiously.

A case-by-case analysis is always necessary, however, to determine a PLA's utility for any given project, as PLAs are neither always good for a project, as enthusiastic proponents often contend, nor are they always bad, as the Executive Branch has concluded by the issuance of the Executive Order. Rather, their use is driven by a number of factors, including the strength of the labor movement in the project's locale, the history of labor

disputes, the availability of an adequate supply of skilled labor, the timetable for the project, and the presence or absence of PLAs on neighboring projects.

With the stroke of a pen, however, this important instrument for labor relations stability has been stricken from the project management options open to the States. In this case, the United States Department of Transportation mechanistically applied Executive Order 13202 ("Executive Order") to deny the use of a PLA, which had been the object of months of study and comprehensive analysis by the State of Maryland's construction manager, for replacement of the Woodrow Wilson Memorial Bridge ("Wilson Bridge"). On a broader level, the Executive Branch has nullified the States' ability to even consider a PLA in its choice of options when determining, in the circumstances of the particular federally assisted project at issue, the most effective manner for implementing that contract.

Federal aid to State projects is important, but the burden of actually carrying out the work is shouldered by the States alone. Except as the States may be constrained by Congress, they are entitled to employ all the means at their disposal to manage State-owned federally assisted contracts in accordance with performance standards set by State law. Review is warranted because the Executive Order unlawfully limits those means.

REASONS FOR GRANTING REVIEW

The petition should be granted because the Court of Appeals' decision subjects State-owned contracts to broad policy-based restrictions that are inconsistent with federal law and this Court's decisions. By affirming the Executive Order, the D.C. Circuit has acted in total disregard of the contract-by-contract approval of State specifications provided for by Title 23 of the United States Code, and the

right of States to employ PLAs under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 et. seq. as interpreted by the Court in *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993) (*Boston Harbor*).

I. THE DECISION BELOW AFFECTS SIGNIFICANT STATE PROCUREMENT INTERESTS AND IS INCONSISTENT WITH THE CONGRESSIONALLY ESTABLISHED SCHEME FOR OVERSIGHT OF FEDERALLY ASSISTED STATE PROJECTS.

The State procurement contracts for the replacement of the Wilson Bridge are illustrative of the federal oversight regulatory scheme that preserves the States' vital project-management interests in the design, procurement and ultimate construction of their important projects. The Wilson Bridge project involves a number of substantial federal aid highway contracts estimated at one billion dollars. After months of study and deliberation with the State, Maryland's construction manager negotiated a PLA in accordance with federal law.

Pursuant to Title 23 of the United States Code, a State must "submit to the Secretary for approval such plans, specifications, and estimates for each proposed project as the Secretary may require." 23 U.S.C. § 106(a)(1). Design and other standards are established by 23 U.S.C. § 109.[1] For highways, "construction work and labor in each State shall be performed under the direct supervision of the State

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[1] Consistent with this statutory guidance, the Secretary of Transportation has promulgated detailed regulations at Title 23 of the Code of Federal Regulations.

transportation department and in accordance with the laws of that State and applicable Federal laws." 23 U.S.C. § 114(a). Congress has thus recognized the primary responsibility for managing the work and the labor lies with the States and that approval of proposed projects in federally assisted procurements is to be carried out on an individualized basis.

Conversely, Congress has failed to enact any law that remotely authorizes the federal government to establish the type of blanket prohibition that the Executive Order imposes with respect to the use of PLAs as a means of managing a federally assisted project. The Court of Appeals concluded that no specific congressional authorization for the Executive Order was required because the order is qualified by the phrase "to the extent permitted by law." App. 7a. While the court suggested three types of litigation that may be available to protect the States in the event the federal approval authority follows the President's order in a manner not permitted by law, this suggestion ignores the States' ownership interest in the affected contract and Congress' demonstrated understanding that federal oversight is to be exercised with respect to the States' administration of each federal aid contract and its unique components.

Neither the federal grant of funds nor the Executive Order's broad limitations on State procurement policy in any way lessen or remove the primary responsibility that Congress has imposed on the States to perform and be accountable for the timely completion of State projects, and to make other procurement decisions consistent with their best judgment and State law. In the federal aid construction setting, Congress has placed that responsibility squarely upon the States as the agencies on the front line, presumably because of their greater and more detailed knowledge of the particular needs of the procurement. By unilaterally

subjecting all State procurements to a single standard, regardless of the source, amount, or purpose of the federal funds that are the vehicle for the restriction, the Executive Order improperly overrides Congress' understanding that the States are to be provided the opportunity to establish specifications for each particular federally assisted project.

II. A POLICY-BASED BAN ON PLA SPECIFICATIONS WITHOUT REGARD TO CIRCUMSTANCES IS REGULATORY ACTION THAT IS PREEMPTED BY THE NLRA.

A. The Executive Order constitutes regulatory action.

The Court of Appeals' standard merits review because it conflicts with this Court's decisions by expanding the zone of "proprietary" conduct to embrace any condition imposed in the exercise of the spending power as long as it only affects conduct of the government contractor in the performance of the government contract. The D.C. Circuit held the Executive Order "clearly constitutes proprietary action rather than regulation" (App. 10a) because "the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." App. 11a. This Court has made it clear that concluding a government condition is proprietary "simply because it operates through [government] purchasing decisions . . . would make little sense." *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 289 (1986).

The Court of Appeals erred in concluding that the Executive Order's directive on PLAs was "proprietary" in nature and thus not subject to NLRA preemption because it does not have the effect of "regulating within a protected

zone." *Boston Harbor*, 507 U.S. at 227. The test that the court applied to conclude that "Executive Order 13202 clearly constitutes proprietary action rather than regulation" (App. 10a) is contrary to the standard set by this Court. The court stated, "[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory *only* when, as the Supreme Court explained in *Boston Harbor*, it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].'" App. 13a (quoting *Boston Harbor,* 507 U.S. at 228) (emphasis added). This Court has never held that the *only* government purchasing conditions that are regulatory are those that affect employer conduct unrelated to the performance of its contractual obligations to the government.

The scope of regulatory conduct is much broader and includes purchasing restrictions that are "'tantamount to regulation' or policymaking." *Boston Harbor*, 507 U.S. at 229. Thus, a State's bid specification "specifically tailored to one particular job" constitutes proprietary conduct, *id.* at 232, but a universal purchasing standard reflecting a general labor policy choice of the Executive to be implemented across the entire federal assistance structure can only be regulation.

The Court of Appeals' opinion not only misinterprets this Court's decisions but also ignores its own prior precedent and, by doing so, has placed its standard in direct conflict with the other circuits that have decided this question. *See Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), *Cardinal Towing v. City of Bedford, Texas,* 180 F.3d 686 (5th Cir. 1999); *Petrey v. City of Toledo,* 246 F.3d 548 (6th Cir. 2001); *Sprint Spectrum L.P., v. Mills,* 283 F.3d 404 (2nd Cir. 2002). In *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir.

1996), for example, the court termed an Executive Order, which barred government contracts to contractors that use strike breakers, as one seeking "to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers. . . . It cannot be equated to the ad hoc contracting decision made by [the State] in seeking to clean up Boston Harbor." *Id.* at 1337. The Executive Order at issue in this case imposes a substantively indistinguishable broad policy that affects all federally assisted projects.

By draping the Executive Order's ban on PLAs in proprietary cover, the Court of Appeals has improperly disregarded this Court's decisions and the individualized decision-making process contemplated by Congress. A State cannot require a PLA on all construction projects, without regard to the circumstances, because such an approach would be regulatory under *Boston Harbor* and therefore preempted by the NLRA. Likewise, an executive order that eliminates the ability of the State to utilize a PLA specification without regard to circumstances is regulatory *and* an unjustified expansion of executive authority into an arena acted upon by Congress. A proprietary decision can only be made by considering the unique circumstances of each particular project. The fiat approach of the Executive Order is, by its very nature, regulatory.

B. The Executive Order is subject to NLRA preemption.

The NLRA preempts the Executive Order's policy-based ban on the States' use of PLAs in federally assisted projects because the Executive Order interferes directly with rights that the NLRA gives to owners and construction managers. Where state and local regulation interferes with the "integrated scheme of regulation" established by

Congress in Sections 7 and 8 of the NLRA, that interference is pre-empted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Preemption also applies to regulation by the Executive Branch through the device of the Executive Order. *Chamber of Commerce v. Reich*, 74 F.3d at 1334.

In the special context of PLAs, the Executive Order interferes with rights given to owners and construction managers by the NLRA. The construction industry proviso to Section 8(e) of the NLRA protects the right of construction industry employers and unions to enter into restrictive subcontracting agreements for work to be done at the site of construction.[2] This Court has interpreted the proviso to protect agreements that are negotiated in the context of a collective bargaining relationship between the

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[2] § 8(e). Codified at 29 U.S.C. § 158(e), provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

employer and the union(s) and "possibly...common situs relationships on particular jobsites as well." *Connell Co. v. Plumbers & Steamfitters Local 100* , 421 U.S. 616, 633 (1975) (referring to project sites with both union and non-union workers). PLAs thus qualify as Section 8(f) "pre-hire" agreements because they are negotiated for, and addressed to the circumstances of, particular project job sites. PLAs are particularly useful when, among other circumstances, union members "would be employed alongside nonunion subcontractors" and, thus, are addressed to the common situs problem contemplated by *Connell. Id.* at 631.

A State's construction manager is eligible and entitled under Section 8(e) to negotiate a PLA as "an employer engaged in the construction industry." Indeed, as this Court stated in *Boston Harbor*, "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as a purchaser should be permitted to do the same." *Boston Harbor*, 507 U.S. at 231. Nevertheless, the Executive Order operates to prevent the entire class of public project construction managers from exercising their statutory entitlement.

As a result, only a contractor-by-contractor option is available under the Executive Order. Under State competitive bidding schemes, contract conditions are set for all contractors by the State bid specifications, which are the only vehicle for project-wide application of any project conditions, including a PLA. The Executive Order forbids both the States and their construction managers, however, from making such agreements and incorporating them into their project bid specifications.

The Executive Order forbids the opportunity for the construction manager to make even a voluntary decision (or to make a recommendation, like the construction managers did in *Boston Harbor* and in the Woodrow Wilson Bridge project) that there should be a PLA on the project. The Executive Order's blanket edict prohibits the State from doing so, without regard to the particular needs or circumstances prevailing at the project, and thus effectively negates the potential for any PLA to be applied to any project receiving federal funds.

The consequence of this total ban on a State's ability to apply a PLA to any federally assisted project flies in the face of this Court's endorsement of public owners' equal footing with private owners. The Executive Order therefore directly interferes with the rights established by the NLRA and prohibits "the very sort of labor agreement that Congress explicitly authorized [in §§ 8(e) and (f)] and expected frequently to find." *Boston Harbor*, 507 U.S. at 233. The Executive Order is invalid because the effect of its "denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*." *Id.* at 232. The President has no authority to impose such a restriction.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 02-527

IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE M. ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK STATE THRUWAY AUTHORITY IN SUPPORT OF PETITIONERS

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Interest of *Amicus* New York State Thruway Authority[1]

This case will determine whether Project Labor Agreements ("PLAs") will continue to be viable construction management tools on public construction projects across the nation.

The New York State Thruway Authority ("Authority") is a New York public authority with responsibility for the construction, reconstruction, improvement, maintenance and operation of the Governor Thomas E. Dewey Thruway ("Thruway") system. The Thruway system consists of 641 miles of highway and over 900 bridges, running from the New York-Pennsylvania border in western New York, through the upstate New York cities of Buffalo, Rochester, Syracuse and Albany, and south to the Connecticut border and into New York City. It includes parts of Interstates 87, 90, 84, 190, 95 and 287, and is a vital link in the nation's interstate transportation system. It is the largest continuous toll road in the United States. Given the size of this infrastructure system, the Authority is constantly engaged in major and minor construction, reconstruction, improvement and repair work. The Authority relies on federal funds to assist with a number of its projects. Notwithstanding this financial assistance, the federal government has no ownership or other proprietary interest in the Thruway.

The Authority strives to accomplish these construction tasks as cost effectively and efficiently as possible. Since this Court's decision in *Building and Construction Trades Council v. Associated*

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[1] This Brief is submitted pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States. The New York State Thruway Authority submitted *amicus* briefs on the issues presented in this proceeding to both the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia during the proceedings below.

Builders and Contractors of Mass./R.I., 507 U.S. 218 (1993) (*"Boston Harbor"*), the Authority has made case-by-case decisions regarding the appropriateness of using PLAs on its projects as a means of achieving these objectives.

The Authority's own experience has shown that a PLA can greatly enhance its construction efforts. For example, on two major construction projects -- the Tappan Zee Bridge refurbishment project and the I-287/Cross-Westchester Expressway Project ($139 million and $265 million, respectively) -- the Authority successfully utilized PLAs to lower costs and improve construction efficiency. For each of these projects (which received at least some federal assistance), studies completed by outside experts showed that PLAs would enhance timely completion and save millions of dollars. With respect to a number of other projects since 1992, however, the Authority determined that a PLA was not likely to enhance project completion and/or generate significant cost savings and opted to proceed without a PLA.

Significantly, in each instance the Authority has been able to determine whether or not to use a PLA based on its own proprietary interests, and consistent with the holding of *Boston Harbor*, in much the same way as any private project owner makes such a decision. The effect of Executive Order 13202 is to take that proprietary decision-making power away from the Authority. Substituted in its place is a federal regulation -- Executive Order 13202, 66 Fed. Reg. 11225 (Feb. 17, 2001). Section 3 of that Executive Order precludes the Authority, and its construction manager, from requiring a PLA for any project receiving federal assistance, no matter how small a portion of total construction costs that federal assistance represents. The Executive Order effectively denies the Authority the right to use a PLA on many projects because as a matter of state law the Authority must contract directly with its project contractors,

and therefore must include any PLA requirement in its bid specifications.

Summary of Argument

PLAs are an important construction management tool for public project owners. Executive Order 13202 takes that tool away from public entities receiving federal financial assistance. Although purportedly procurement-related, the Executive Order accomplishes this end through regulation. Because this regulation conflicts with federal labor policy it is preempted by the National Labor Relations Act.

Reasons for Granting the Writ

In upholding Executive Order 13202, the decision of the D.C. Circuit Court of Appeals raises serious questions as to whether, despite this Court's *Boston Harbor* decision, PLAs sanctioned by Section 8(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), can be used effectively on public construction projects. *Building and Construction Trades Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). The D.C. Circuit seriously misapplied the federal preemption doctrine as developed by this Court and applied in *Boston Harbor*, and which other Circuit Courts of Appeals have correctly applied since *Boston Harbor*. As a result, public project owners, private construction employers, employees and unions have been denied important federal rights. The issues raised by this case are of critical importance to the management of public construction projects in this country and warrant further guidance from this Court.

I.

THE DECISION BELOW IS ANTITHETICAL TO THE FEDERAL PREEMPTION DOCTRINE

Boston Harbor recognized the right of public owners, acting in a proprietary capacity, to utilize PLAs in the construction and repair of their real property assets to the same degree that these construction management tools are available to private owners. This Court not only concluded that this public use of PLAs does not conflict with federal labor policy, but found that such use "exemplifies" the very workings of the market forces which Congress anticipated in establishing federal labor policy. *Boston Harbor*, 507 U.S. at 233.

The D.C. Circuit's decision permits the federal government to take this right away based on its conclusion that the Executive Order reflects proprietary conduct which is not subject to preemption principles. The Court of Appeals based this conclusion on two faulty premises: first, whenever the federal government acts to ensure the most effective use of its funds, it is acting in a proprietary capacity; and second, the imposition of conditions on the award of federal financial assistance constitutes regulatory conduct only if those conditions do not relate to the project receiving the federal funds.

A. The Role of Project Labor Agreements

To place the present controversy in context it is important to understand how PLAs operate, and how they benefit public project owners, contractors and the public.

Section 8(f) of the NLRA allows a construction industry employer and union to enter into special collective bargaining agreements called prehire agreements, while Section 8(e)

permits these prehire agreements to require that all contractors on a particular project become parties to these agreements. *Boston Harbor*, 507 U.S. at 230-31; 29 U.S.C. § 158(e) and (f). A PLA is a type of prehire agreement, designed to govern all contractors, employees, and unions performing construction work on a specific project. In the absence of a PLA, each contractor on a project would operate under the terms of its own local collective bargaining agreement with each applicable labor organization or, if non-union, under its own particular rules and policies. Oftentimes these agreements and policies are in conflict, which makes it difficult and costly to coordinate construction. A PLA is an umbrella agreement that governs all on-site construction and supersedes conflicting provisions of local agreements and non-union contractor practices, thereby providing uniformity and standardization across the project. On large, complex public projects, this means more timely, efficient and cost effective construction.

PLAs also typically contain comprehensive dispute resolution mechanisms to minimize worksite disputes, no strike clauses that provide the project with blanket protection from all disruptions due to labor disputes for the duration of the project, and cost saving provisions to help contain project costs and assist in on-schedule completion. Because PLAs are available to union and non-union bidders alike, all contractors have equal access to project work. However, PLAs typically require that all successful project bidders become bound to the PLA, that the signatory unions be recognized as the bargaining representative of employees covered by the agreement for that one project, and that covered employees either become union members or pay the equivalent of union dues.[2]

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[2] Most PLAs expressly provide that covered employees have the choice to become full union members or simply pay a dues equivalent without full membership. *See also Communications Workers v. Beck*, 487 U.S. 735 (1988).

1. A Case Study: The Tappan Zee Bridge Project

A 1993 Authority project illustrates the difficult management issues that confront public project construction managers and owners, and how PLAs can solve those issues. In 1993, the Authority undertook the $139 million repair and refurbishment of the Tappan Zee Bridge ("TZ Bridge Project"). This three-mile long bridge crosses the Hudson River, connecting Rockland and Westchester Counties in New York, via Interstate 87. It is a major commuting thoroughfare to New York City (more than 24.5 million vehicles cross the Bridge in an easterly direction alone on an annual basis), and generates toll revenues of nearly $72.2 million annually. The Project was anticipated to take over four years to complete and involve over 1,000,000 man-hours. The Bridge is located in a highly unionized part of the State, and experience indicated that, with or without a PLA, the successful bidders for that work likely would be union contractors already party to local labor agreements. Therefore, it was anticipated that the scope of the TZ Bridge Project would involve 19 different local union jurisdictions and require coordinating work under 19 different local labor contracts.

(a) The Challenges

The number of union jurisdictions involved on the TZ Bridge Project presented the potential for major project management problems. The union agreements contained conflicting provisions regarding (1) start and end times for work shifts, (2) pay practices, (3) break times, (4) holidays, (5) availability of flexible shifts (*e.g.*, four, 10-hour day workweeks), and (6) various other work rules. In addition, any non-union contractor on the Project would have brought its own rules to the site. Coordinating work under these conflicting provisions necessarily would have added time and cost to the Project.

The involvement of so many different trade jurisdictions also increased the potential for costly work stoppages. With 19 different unions, the risk of jurisdictional disputes was high. The Authority also was concerned that lawful disputes between organized labor and non-union contractors could lead to picketing, project disruption, and costly construction delays. In addition, over the projected four-year life of this project, each of these 19 local labor agreements would expire at least once. Consequently, there were going to be at least 19 separate negotiations occurring between local unions and local contractors during the construction period, any one of which could have led to an area strike directly affecting continuation of work on the TZ Bridge Project and use of the Bridge.

Finally, the very nature of the TZ Bridge, the scope of the Project, and its duration made it critical that, regardless of local union agreements or non-union construction practices, the Authority have the ability to stage construction work around peak traffic times and allow the use of innovative reconstruction methods, thereby minimizing commuter disruption and inconvenience.

(b) The Solutions

The Authority turned to a PLA to meet these challenges. As an umbrella agreement, the PLA superceded conflicting provisions found in the otherwise applicable local labor agreements and non-union contractor practices, thus ensuring uniformity on the site. For example, uniform shift provisions in the PLA eliminated the inefficiencies caused by differing work day start and end times and allowed the use of coordinated work schedules for everyone. Similarly, the PLA required everyone to recognize the same holiday schedule, coordinate break times and follow other uniform work rules. And, when the project management needs of the Bridge required extended

work days (*i.e.*, the use of four, 10-hour day workweeks) to allow work during off-peak traffic times, the PLA permitted that schedule change. The TZ Bridge PLA also allowed contractors to utilize extended nighttime shifts for implementation of innovative reconstruction methods unique to that particular project, while minimizing traveler inconvenience.

This ability to manage construction under a uniform set of rules allowed the Project to proceed on the fastest track and in the least disruptive manner possible, which is critical on congested highway and bridge projects where construction must proceed side-by-side with continued use. An enhanced management rights clause in the PLA, along with other scheduling provisions, gave the Authority's construction project manager greater flexibility to coordinate the completion of the various construction phases, reducing the risk of delays and increased costs. When dealing with a revenue-producing asset like a toll bridge, where commuter inconvenience can cause travelers to seek alternative routes, on-time completion of construction is important to revenue maintenance.

The PLA also eliminated the risk of significant delays due to work stoppages. The TZ Bridge PLA contained a comprehensive no strike clause, far more protective of the Project than any provision found in a local labor agreement. This protection extended to all work disruptions, including those originating off site but with the potential to impact Project work. In fact, as a result of this provision, a union which was engaged in a strike against a TZ Bridge contractor off-site, was required to, and did, continue to simultaneously provide workers to that same contractor for all TZ Bridge work, so that the Project suffered no disruption. When the magnitude of the costs resulting from construction delays due to labor disputes inherent on every large construction project is considered, the immense value of this protection is apparent.

This PLA also provided a means of reducing direct labor costs. Under New York prevailing wage law, premium pay for work in excess of eight hours in a day is normally required. The PLA, however, served as a waiver of that requirement and allowed the Project to use a more efficient four-day, 10-hour work schedule with all hours paid at straight time rates. The result was that the construction project manager had added flexibility without an increase in construction costs.

The Authority's consultant for the TZ Bridge Project estimated construction cost savings of more than $3.7 million just from the uniform provisions for work week and shift times, holidays, and apprentices contained in the PLA. Total estimated savings attributed to use of a PLA exceeded $6 million.[3]

B. Purchasing Decisions Can Constitute Regulation

The Court of Appeals observed that because the government is "unquestionably ... the proprietor of its own funds[,] . . . when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." 295 F.3d at 35. If the distinction between proprietary and regulatory conduct were that simple, virtually all governmental purchasing decisions would constitute proprietary conduct and be immune from preemption analysis. Yet, it is well recognized that purchasing

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[3] The Authority's I-287/Cross Westchester Expressway PLA also contained a provision allowing that project to take advantage of a Workers' Compensation alternative dispute resolution ("ADR") program. This alternative is available only through collective bargaining and thus is not an option for non-union employers unless covered by an agreement like a PLA. See N.Y. Workers' Comp. Law § 25(2-c) (McKinney 1993 & Supp. 2002). Cost savings attributable to implementation of a Workers' Compensation ADR Program alone on that project were estimated at $1.28 million. Total cost savings estimated by the Authority's consultant from the use of a PLA on the I-287/Cross Westchester Project were more than $8 million.

decisions can indeed constitute regulatory action. *Chamber of Commerce v. Reich*, 74 F. 3d 1322, 1334 (D.C. Cir. 1996); *see also Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282 (1986).

Given the pervasive role of the federal government in the economy generally, and in particular its role in the financing of state and local public (especially highway) construction,[4] it defies logic to conclude that the imposition of blanket conditions on the receipt of federal financial assistance is not regulatory conduct. The D.C. Circuit itself, in its earlier *Reich* decision, found that a prior Executive Order, 12954, 60 Fed. Reg. 13023 (Mar. 10, 1995), constituted regulatory action despite the fact that it was also premised on the federal government's "proprietary" interest in ensuring the economical and efficient administration of federal government contracts. *Chamber of Commerce v. Reich*, 74 F.3d 1322; *see also Cardinal Towing v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999) (recognizing that procurement activities can constitute regulation). Thus, the simple fact that Executive Order 13202 purports to be procurement-related cannot shield it from preemption analysis.

C. The Determination That Regulatory Conduct Requires The Imposition Of Conditions Unrelated To The Contract At Hand Is Misplaced

The D.C. Circuit also held that Executive Order 13202 represents proprietary, and not regulatory, conduct because the conditions it imposes are "narrowly" limited to the particular projects receiving federal assistance. Rather than denying funding to recipients who require a PLA in any setting, the

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[4] The Department of Transportation's Federal Highway Trust Fund alone provided more than $22 billion in aid to state and local governments in 1999. Statistical Abstract of the United States (2000 ed.) 307, Chart No. 499.

D.C. Circuit noted that the Executive Order "only" denies federal funding to recipients requiring a PLA on the project for which that funding is intended. Referencing *Boston Harbor*, the D.C. Circuit observed that "[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory *only when* ... it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [government].'" 295 F.3d at 36 (emphasis added).[5]

First, *Boston Harbor* does not support the D.C. Circuit's conclusion. *Boston Harbor* holds that government imposed conditions which are unrelated to the performance of the contract commitments at hand are regulatory. However, *Boston Harbor* does not hold that conditions *must* be unrelated to contractual commitments in order to constitute regulation, nor does it sanction all government conditions simply because they bear some relation to those contractual commitments.

Nor should this simplistic dichotomy be adopted. Such a standard would permit the government to impose wide-ranging, blanket conditions, contrary to federal labor policy and disruptive of the deliberate balance Congress sought to

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[5] This formulation, aside from its inappropriateness, represents a circumstance which is not present here. The quoted language refers to a situation in which there is a direct contractual relationship between two parties -- the entity imposing the condition and the entity on which it is imposed -- and the condition relates directly to the latter's performance under that contract. Thus, in *Boston Harbor*, the MWRA imposed a condition on those directly doing business with it, and relating to their performance of the contract between them. Here, the Executive Order imposes a condition on a party the federal government has contracted with (the recipient of federal assistance), but that condition is not aimed at their relationship; rather it is aimed at the relationship between the recipient and a third party (its project contractors), and in some cases the relationship between yet another party (the construction manager) and those same project contractors.

strike, all contrary to basic preemption notions. For example, under this reasoning an Executive Order could deny federal assistance to any public construction project on which union members (or for that matter any non-members of a union) worked. So long as that Order purported to be based at least in part on a Presidential determination that the presence of union members (or the presence of non-members) drove up costs and was not an effective use of federal dollars, it would be a mere purchasing/proprietary decision because it only affected conduct on the assisted project. A similar Presidential determination could justify an Executive Order prohibiting federal assistance recipients from purchasing with those funds goods made by union (or non-union) labor. Or, an Executive Order could debar (or impose other penalties on) contractors found guilty of unfair labor practices on a federally financed project, thereby creating its own, secondary NLRA-enforcement scheme, simply because this action was limited to conduct occurring on that federally financed project.[6] Surely, these conditions, which run directly counter to federal labor policy but affect only conduct relating to a federally owned or assisted project, would not be countenanced.

Second, the Court's decision fails to accord proper weight to the distinction between proprietary and regulatory action found important in *Boston Harbor*. Crucial to this Court's determination was the individualized nature of the MWRA's action:

> The challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project. There is therefore no basis on which

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[6] And if the federal government could accomplish these ends without running afoul of preemption principles, then so too could a state, or even local, government with respect to projects it financed or funded.

> to distinguish the incentives at work here from those that operate elsewhere in the construction industry, . . .

507 U.S. at 232. The D.C. Circuit downplayed this important factor based on its observation that there is no "good explanation" why a blanket rule is inconsistent with the actions of a "proprietor." But it is not coincidental that in cases such as *Wis. Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), this Court struck down "regulation" which was applied in a rigid and undiscriminating manner across-the-board, and which did not reflect individualized, case-by-case decision-making.

It is self-evident that identical governmental and private conduct carries with it different impacts, and those differences are relevant in distinguishing between regulatory and proprietary conduct. "'[G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints....[I]t is far from unusual for federal law to prohibit states from making spending decisions in a way that are permissible for private parties.'" *Boston Harbor*, 507 U.S. at 228 (citation omitted). When the government establishes a broad policy, which affects millions of workers and thousands of businesses, as it has done here, it is acting in a "characteristically ... governmental" manner, and is engaged in regulation. *See also Chamber of Commerce v. Lockyer*, ___ F.Supp.2d ___, 2002 U.S. Dist. LEXIS 19877 (C.D. Ca. Sep. 18, 2002) (recognizing "rigid and undiscriminating" application of a rule as a hallmark of regulation).

Other Circuit Courts, applying preemption principles, have recognized this fact. In *Dillingham Const. N.A. Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), the Court rejected the argument that a challenged state apprenticeship law was not

"regulation" because it only related to the employer's performance of its contractual obligations to the state. The state's efforts to uniformly apply a rule to all public works contracts constituted "regulation" subject to federal NLRA preemption principles. Central to the Ninth Circuit's conclusion was its observation that the state law in issue was not established for a specific project, but rather was of general application.

The Fifth Circuit Court of Appeals' decision in *Cardinal Towing v. City of Bedford, Texas*, 180 F.3d 686, even more clearly highlights the conflict between the D.C. Circuit and other Circuit Courts in determining whether government conduct is regulatory or proprietary. Although not arising in an NLRA preemption context, the Fifth Circuit drew from *Boston Harbor* and *Gould* a two-part test:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, ***as measured by comparison with the typical behavior of private parties in similar circumstances***? Second, does the narrow scope of the challenged action ***defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem***? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

180 F.3d at 693 (emphasis added). There can be little doubt that Executive Order 13202 constitutes regulation under this standard. Especially in the context of Section 3 of the Executive Order, wherein the D.C. Circuit viewed the federal government as acting as a lender or benefactor, it is safe to conclude that a

"typical" lender of construction funds does not involve itself in the labor relations of the contractors who are being hired by the borrower/owner with those borrowed funds. And most certainly a "typical" lender would not make an across-the-board determination on such an issue, paying no regard to the particular circumstances of the specific project at hand. Thus, the scope of the Executive Order cannot be considered sufficiently narrow to defeat an inference that its "primary goal was to encourage a general policy rather than address a specific proprietary problem." Where, as here, its prohibitions apply uniformly to every project, regardless of whether the particular PLA available actually benefits a specific project, it smacks of an intent to encourage a general policy and not to address a particular proprietary concern.

D. The Executive Order Conflicts With Federal Labor Policy

The second part of any NLRA preemption analysis is determining whether the regulation at hand conflicts with federal labor policy. Although the D.C. Circuit never reached this issue, clearly Executive Order 13202 is inconsistent with that labor policy and is preempted.

1. Executive Order 13202 Is Invalid Under *Machinists* Preemption Principles

In order to maintain the "intentional balance" Congress struck between labor and management, governmental entities are prohibited from regulating in areas that Congress determined should be controlled by the economic forces of the free market. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976).

As explained in *Boston Harbor*, federal labor policy deliberately provides participants in the construction industry with wide, unregulated latitude to negotiate special collective bargaining agreements aimed at addressing the unique problems of that industry. Under Section 8(f), only the construction industry is exempted from the normal regulation which precludes prehire agreements. 29 U.S.C. § 158(f). Under the Section 8(e) proviso, it is again the construction industry which is excluded from the typical regulations which preclude contracting and subcontracting restrictions of the type found in mandatory PLAs. 29 U.S.C. § 158(e). Congress chose to let the participants in the construction industry deal directly with these issues through the bargaining process. Consequently, the *Machinists* doctrine precludes governmental interference in these areas of federal labor policy which Congress determined should be left free of regulation.

Executive Order 13202 ignores this mandate and seeks to regulate these very activities by prohibiting the use of PLAs. In light of this principle, it is not surprising that the D.C. Circuit foreshadowed the result required in this case when it earlier expressed its own "doubt" regarding the legality of President George Bush's 1992 Executive Order 12818, 57 Fed. Reg. 48713 (Oct. 28, 1992), which also prohibited the use of PLAs on federally funded construction projects. *See Chamber of Commerce v. Reich*, 74 F.3d at 1337; *see also Boston Harbor*, 507 U.S. at 232 ("Indeed, there is some force to petitioners' argument . . . that denying [a PLA] option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*").

An Executive Order that requires all federally financed projects to be built under a mandatory PLA would be similarly preempted. Even if the government's argument that Executive

Order 13202 merely requires "neutrality" (because it only prohibits "mandatory" PLAs) is accepted, the result is the same. The fatal flaw in Executive Order 13202 is not the substance of its position on the PLA issue -- whether it be described as pro, con, or even "neutral" -- but rather that, through government regulation, it has taken a position at all and that it seeks to impose that policy decision on others.

2. Executive Order 13202 Is Invalid Under *Garmon* Preemption Principles

As established by the Supreme Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), *Garmon* preemption is "designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' 'integrated scheme of regulation,' . . . embodied in §§ 7 and 8 of the NLRA." *Boston Harbor*, 507 U.S. at 225 (citations omitted). Simply put, *Garmon* precludes interference with conduct the NLRA permits, including interference by Executive Order. *Chamber of Commerce v. Reich*, 74 F.3d at 1334.

Of most concern to the Authority is the fact that the Executive Order interferes with its right, when it acts in a proprietary capacity, to use PLAs on the same terms private sector project developers are permitted to use them. *Boston Harbor* recognized that: (1) PLAs in the private sector are both consistent with federal labor policy and unquestionably permissible; and (2) given the purposes served by PLAs, and the objectives of the NLRA, there is no basis for distinguishing between a private developer and a public owner acting in a proprietary capacity using PLAs. *Boston Harbor*, 507 U.S. at 231. *Boston Harbor* recognized a public owner's right both to use a PLA and to impose the PLA on all successful bidders seeking project work.

Executive Order 13202 denies public owners like the Authority the opportunity to exercise that right.[7]

In the end, mandatory PLAs of the exact kind deemed permissible by the *Boston Harbor* Court are prohibited by the Executive Order on any state or local government project receiving federal financial assistance. And, under the D.C. Circuit Court's decision, could be prohibited by any state or local government providing funding to a project. *Boston Harbor* was greatly influenced by then Chief Judge Breyer's dissenting opinion issued when that case was before the First Circuit. Central to Chief Judge Breyer's concerns was the recognition that preemption in the labor context is designed to ensure a uniform approach to federal labor policy, and avoid an "odd crazy-quilt" of inconsistent practices. *Associated Builders v. Mass. Water Resources Auth.*, 935 F.2d 345, 364 (1st Cir. 1991) (Breyer, C.J., dissenting), *rev'd*, 507 U.S. 218 (1993). Thus, he concluded, to permit private contractors to require PLAs on their projects and prohibit public owners from doing the same would create an unjustifiable inconsistency based on the public and private nature of the project's owners. The D.C. Circuit's decision has exactly that effect. Whether PLAs can be used on a project will "reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether or not the entity letting the contracts [receives any

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[7] The Executive Order also directly interferes with the NLRA rights of private employers in the construction industry who perform services for public project owners. In those states where, unlike New York, construction managers on public projects contract directly with project contractors, the Executive Order still precludes those construction managers from requiring a PLA. Yet, in those circumstances, the private sector construction managers are "employers in the construction industry," and are fully entitled to all the rights and benefits of the NLRA, including the right to negotiate, enter into, and operate (including the right to require others to operate) under a PLA. *See Boston Harbor*, 507 U.S. at 230.

federal funding]." *See* 935 F.2d at 364. Such a result is inconsistent with federal labor policy.

E. The Significance Of The Issues Presented

According to the U.S. Department of Commerce, in 1999 there was more than $53 billion in new highway and street construction in the United States, and the U.S. Department of Transportation's Highway Trust Fund alone provided more than $22 billion in assistance to state and local governments for such purposes. Statistical Abstract of the United States 711 and 307, Charts No. 1191 and 499. Total federal financial assistance to public construction extends beyond just highway construction. Under any standard, the impact of federal assistance on public construction is significant.

Equally significant is the potential role for PLAs in that public construction, to which the litany of recent cases which have upheld the use of PLAs on public projects bears witness. *See, e.g., Associated Builders & Contractors, Inc. v. San Francisco Airport Comm'n*, 21 Cal. 4th 352, 981 P.2d 499 (Cal. 1999); *Associated Builders & Contractors, Inc. v. Southern Nevada Water Auth.*, 115 Nev. 151, 979 P.2d 224 (Nev. 1999); *A. Pickett Constr., Inc. v. Luzerne Cty. Convention Ctr. Auth.*, 738 A.2d 20 (Pa. 1999); *New York State Chapter, Inc. v. New York State Thruway Auth.*, 88 N.Y.2d 56, 666 N.E. 2d 185 (N.Y. 1996).

Importantly, however, in each of these cases, and the many more just like them, the public project owner was able to make an individualized assessment of whether the particular PLA available for use on that specific project would in fact benefit that project. Under Executive Order 13202, that individualized decision-making authority is taken from any project owner receiving federal assistance. The result is that for billions and billions of dollars of public construction each year, the ability

to proceed in the most efficient and cost effective manner available simply will not exist.

The concern raised by the D.C. Circuit's decision is not that this particular Executive Order prohibits PLAs, for the next Executive Order could require the use of PLAs on all federally assisted projects. Rather, it is that, in either case, the real proprietors of these public projects are denied the recognized right under federal law to decide what is in their best interests, and are forced to succumb to the executive policy of the day.

Conclusion

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Dated: November 4, 2002

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No. 02-527

In the Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the President's decision not to require or forbid project labor agreements on federal and federally funded construction contracts is preempted by the National Labor Relations Act.

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JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 295 F.3d 28. The opinion of the district court (Pet. App. 15a-73a) is reported at 172 F. Supp. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2002. The petition for a writ of certiorari was filed on October 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a challenge to the validity of an Executive Order of the President concerning the use of project labor agreements on federal and federally funded construction projects.

A project labor agreement (PLA) is a pre-hire collective bargaining agreement that is negotiated between a contractor on a construction project and one or more unions. See *Building & Constr. Trades Council* v. *Associated Builders & Contractors* (*Boston Harbor*), 507 U.S. 218, 221-222 (1993). A PLA may establish the terms of employment for persons who will work on the construction project, but who have not yet been hired or voted on union representation. Typically, a PLA provides that the signatory union will represent all workers on the project and that all subcontractors will adhere to the PLA. See Pet. App. 2a; United States General Accounting Office, *Report to Congressional Requesters: Project Labor Agreements—The Extent of Their Use and Related Information* 1, 4 (May 1998) (C.A. App. 255, 258).

Section 8(e) the National Labor Relations Act (NLRA), 29 U.S.C. 158(e), generally bars secondary agreements between unions and employers (*i.e.*, agreements "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person"). Section 8(e) contains an exception, however, for agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." 29 U.S.C. 158(e). Section 8(f) of the

NLRA, 29 U.S.C. 158(f), further provides that "[i]t shall not be an unfair labor practice * * * for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members," where, among other things, "such agreement requires as a condition of employment, membership in such labor organization."

2. In February 2001, the President issued Executive Order 13,202, titled Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, 66 Fed. Reg. 11,225 (2001) (Executive Order) (Pet. App. 74a-77a). The Executive Order directs federal agencies to ensure that bid specifications for federal construction contracts neither require contractors to enter into PLAs with labor organizations nor prohibit contractors from doing so. See *ibid.* (§ 1) (Pet. App. 74a-75a). The Executive Order also directs federal agencies to ensure that the bid specifications for federally funded construction contracts neither require nor prohibit PLAs. See *ibid.* (§ 3) (Pet. App. 75a).

The Executive Order specifically provides that contractors and subcontractors on federal and federally funded construction projects are not prevented from voluntarily entering into PLAs with labor organizations. 66 Fed. Reg. at 11,225 (§ 1(c)) (Pet. App. 75a). It simply prevents federal agencies, federal fund recipients, and construction managers acting on their behalf from requiring contractors to enter into PLAs or prohibiting them from doing so. As the court of appeals explained, "[t]he result in practice is to leave to the

contractors working on a project the choice whether to enter into, and to require their subcontractors to enter into, a PLA, presumably depending upon whether it is likely to increase or to decrease their costs." Pet. App. 3a.

The Executive Order is designed to "promote and insure open competition" on federal and federally funded construction projects, and thereby to "reduce construction costs to the Federal Government and to the taxpayers." 66 Fed. Reg. at 11,225 (preamble) (Pet. App. 74a). It was promulgated pursuant to the President's general supervisory authority under Article II of the Constitution and his statutory authority over government procurement and supply, see Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. 471 *et seq.* See 66 Fed. Reg. at 11,225 (preamble) (Pet. App. 74a). And it applies only "[t]o the extent permitted by law." *Ibid.* (§§ 1, 3) (Pet. App. 74a, 75a).

3. Petitioners, two labor organizations and a municipality, brought suit in the United States District Court for the District of Columbia to enjoin the enforcement of the Executive Order, contending that it prevented them from negotiating PLAs on federal and federally funded construction projects. Petitioner Building and Construction Trades Council specifically challenged the application of the Executive Order to the Woodrow Wilson Bridge construction project, a joint undertaking by Maryland, Virginia, and the District of Columbia financed by a $1.5 billion appropriation by Congress.

Before the issuance of the Executive Order, Maryland had agreed to require a PLA as a bid specification for the foundation portion of the Wilson Bridge project. Because the project was federally funded, Maryland's bid specifications were subject to review by the Federal

Highway Administration, which rejected the PLA requirement as inconsistent with the Executive Order. Subsequently, when Maryland sought bids on the superstructure portion of the project, petitioners sought a preliminary injunction to prevent the Federal Highway Administration from again rejecting a bid specification requiring a PLA.

The district court issued a preliminary injunction barring the application of the Executive Order to the Wilson Bridge project, and subsequently entered a permanent injunction barring the enforcement of the Executive Order generally. Pet. App. 22a, 72a.[1] The court held that the President lacked statutory or constitutional authority to promulgate Section 3 of the Executive Order, which directs federal agencies to ensure, "[t]o the extent permitted by law," that recipients of federal funds do not require or prohibit PLAs on federally funded construction projects. *Id.* at 46a-54a.[2] The court further held that Section 1 of the Executive Order, which directs federal agencies not to require or prohibit PLAs on federal construction projects, as well as Section 3 are preempted by the NLRA, on the ground that they alter the "delicate balance of bargaining and economic power" established by Section 8 of the NLRA, 29 U.S.C. 158. Pet. App. 66a (quoting *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1337, on reh'g, 83 F.3d 439 (D.C. Cir. 1996)).

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[1] After the district court issued the preliminary injunction, the Federal Highway Administration, for reasons unrelated to the Executive Order, denied Maryland's request to include a PLA in the bid specifications for the superstructure contract. That decision has not been challenged.

[2] The district court assumed that the President had the statutory and constitutional authority to issue the remaining portions of the Executive Order.

4. The United States Court of Appeals for the District of Columbia Circuit reversed and vacated the injunction. Pet. App. 1a-14a. The court of appeals held, contrary to the district court, that Article II of the Constitution provided the President with the authority to issue Section 3 of the Executive Order. The court of appeals also held that the Executive Order is not preempted by the NLRA, because the President took proprietary, not regulatory, action in establishing guidelines for the use of PLAs on federal and federally funded construction projects.

First, the court of appeals recognized that the President's authority under Article II to execute the laws "necessarily encompasses 'general administrative control'" of his subordinates. Pet. App. 6a-7a (quoting *Myers* v. *United States*, 272 U.S. 52, 164 (1926)). The court reasoned that Section 3 of the Executive Order is within the President's general supervisory authority under Article II, because it directs federal agencies "how to proceed in administering federally funded projects, but only '[t]o the extent permitted by law.'" Pet. App. 7a (quoting Executive Order).

Second, the court of appeals held that the Executive Order is not preempted by the NLRA, because it "clearly constitutes proprietary action rather than regulation." Pet. App. 10a. The court observed that "the principles of NLRA preemption come into play only when the Government is 'regulating within a protected zone,' and not when it is acting as a proprietor, 'interact[ing] with private participants in the marketplace.'" *Ibid.* (quoting *Boston Harbor*, 507 U.S. at 227).[3]

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[3] The court of appeals acknowledged the government's contention that NLRA preemption principles "developed to govern federal-state relations are ill-suited to cases such as this, which in-

The court of appeals recognized that the decision whether to use a PLA on a construction project is one that private employers are free to make under the NLRA. Pet. App. 11a. The court also recognized that, under this Court's decision in *Boston Harbor*, the same decision is proprietary when made by a state or local government with respect to its construction projects, and thus is not subject to NLRA preemption. *Ibid.* The court held that such decisions are likewise proprietary when made by the President with respect to the federal government's own construction projects. *Ibid.*

The court of appeals held that the President's decision that, to the extent permitted by law, federal fund recipients may neither require nor prohibit PLAs on federally funded construction projects is also proprietary. Pet. App. 11a. The court explained that "the [federal] Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." *Ibid.*

The court of appeals rejected petitioners' argument that the President's decision whether to require or prohibit PLAs on federal and federally funded construction projects, although proprietary if made on a project-by-project basis, becomes regulatory if made through "blanket, across-the-board rules." Pet. App. 12a-13a. The court explained that "there simply is no logical justification for holding that if an executive order establishes a consistent practice regarding the

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volve relations between two branches of the federal government." Pet. App. 10a n.*. The court declined, however, to rule on the "merit of that argument," observing that its decision in a previous case, *Chamber of Commerce*, had found a federal executive order to be preempted under the NLRA. *Ibid.*

use of PLAs, it is regulatory even though the only decisions governed by the executive order are those that the federal government makes as a market participant." *Id.* at 12a (quotation and alteration marks omitted). Here, the court concluded, "[b]ecause the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'" *Id.* at 13a.

ARGUMENT

Petitioners do not dispute that the President's decision neither to require nor to prohibit a PLA on a single federal (or federally funded) construction project is proprietary, and thus does not implicate principles of NLRA preemption. Petitioners contend, however, that the same decision, when announced by the President in an Executive Order applicable to all such projects, is transformed into a regulatory one. The court of appeals' contrary holding, based on a straightforward application of this Court's decision in *Boston Harbor*, is correct and does not conflict with the decision of any other court of appeals.

The second question presented by petitioners—whether the Executive Order, if regulatory, would be preempted by the NLRA—is entirely dependent on the first. This Court, like the court of appeals, would have no need to reach that question, because the Executive Order is proprietary, not regulatory, in character. In any event, the Executive Order, even if viewed as an exercise of the President's regulatory authority, would not be subject to preemption under the NLRA. Accordingly, neither question presented by petitioners warrants this Court's review.

1. Petitioners challenge the court of appeals' holding that the President's decision whether to require PLAs on federal and federally funded construction projects remains proprietary, whether the President makes that decision on a case-by-case basis or, as here, on a comprehensive basis. Petitioners contend that the court of appeals applied a standard for determining whether government action is proprietary that is inconsistent with this Court's decision in *Boston Harbor* and the decisions of three other circuits. Petitioners are mistaken.

a. The NLRA, by its terms, does not apply to the United States government or to the States. See 29 U.S.C. 152(2). This Court has made clear that principles of NLRA preemption, while applicable when a state or local government acts as regulator, are not applicable when a state or local government acts in a proprietary capacity—that is, as a participant in the market for goods or services.

In *Boston Harbor*, the Court held that a state agency's decision to require a PLA on a state construction project was proprietary, and thus not subject to NLRA preemption principles. 507 U.S. at 231-232. The Court emphasized that Congress, in the NLRA, had expressly protected private employers' choice whether to require a PLA on a construction project. *Id.* at 232. "In the absence of any express or implied indication by Congress that a State may not manage its own property where it pursues its purely proprietary interests, and where analogous private conduct would be permitted," the Court refused to "deny[] an option to public owner-developers that is available to private owner-developers." *Id.* at 231-232.

The Court distinguished the proprietary activity in *Boston Harbor* from regulatory activity, which the

Court described as activity designed to compel "employer conduct unrelated to the employer's performance of contractual obligations to the State." 507 U.S. at 228-229. Thus, in *Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), the State was held to be engaging in regulatory activity when, as a "means of enforcing the NLRA," *id.* at 287, it debarred employers with a past history of unfair labor practices from state contracting, whether or not those violations had any connection to the contractor's work for the State.

b. The Executive Order in this case is the product of the very type of decision that *Boston Harbor* determined to be proprietary: a government's decision whether to require a PLA on a construction project in which the government itself is a participant. Petitioners do not (and, given *Boston Harbor*, cannot) contest that such a decision would be proprietary, and thus not subject to NLRA preemption analysis, if it applied only to a single construction project, such as the Wilson Bridge project. Petitioners nonetheless contend that the same decision becomes regulatory when the government determines that its interests are best served by neither requiring nor prohibiting PLAs on any federal or federally funded construction projects. In arguing that such a decision is regulatory, petitioners seek to apply principles of NLRA preemption to limit not only the *kinds* of economic decisions that government entities can make in procuring goods and services, but also the *ways* in which governments can make those decisions.

As the court of appeals observed, petitioners offer "no logical justification" for such a sweeping intrusion into government operations and, in particular here, into the decision-making of the President of the United

States. Pet. App. 12a. The President may determine that the government's own economic interests are best served by neither requiring nor prohibiting PLAs on its construction projects, as was done here. Or, the President may decide that the government's economic interests are best served by authorizing federal agencies to require PLAs on "large and significant" government construction projects, a conclusion reached by President Clinton in issuing a prior directive. Presidential Memorandum of June 5, 1997, Use of Labor Agreements for Federal Construction Projects (C.A. App. 250-252). In either case, the President is making a wholly permissible decision regarding the efficient expenditure of government funds—the same sort of decision that a private party that owned or financed a construction project might make with respect to its own funds. The fact that the decision is made generally, as here, rather than on a case-by-case basis, as petitioners prefer, does not alter its proprietary character under *Boston Harbor*.

c. The court of appeals' decision does not, as petitioners assert (Pet. 11-12), "direct[ly] conflict" with the decision of any other court of appeals. No other circuit has even considered the question whether this Executive Order, or any remotely similar Executive Order, is proprietary or regulatory in character, much less resolved that question inconsistently with the D.C. Circuit in this case.

Indeed, three of the four cases cited by petitioners held, as did the D.C. Circuit here, that the government requirement at issue was proprietary, not regulatory. See *Sprint Spectrum L.P.* v. *Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686 (5th Cir. 1999); *Colfax Corp.* v. *Illinois State Toll Highway Auth.*, 79 F.3d 631,

634 (7th Cir. 1996). The requirements in those cases, in contrast to the one here, were confined to a single project or contract. It was thus unnecessary for the courts to decide whether the same requirement, if applied to government projects or contracts more generally, would at some point become regulatory. Accordingly, although the courts noted the narrow scope of the challenged requirements in finding them to be proprietary, the courts would not necessarily have held the requirements to be regulatory had they been applied more broadly.

The remaining decision, *Dillingham Construction N.A., Inc.* v. *County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), involved a state prevailing wage law that required employers on state public works projects to pay prevailing wages to employees in apprenticeship programs that had not received state approval, but permitted such employers to pay lower wages to employees in state-approved programs. The Ninth Circuit held that the law was regulatory, not proprietary. Its analysis did not, however, turn on whether the law was specific or general in scope. The Ninth Circuit reasoned that the law was "not motivated by management concerns" about state construction projects, but instead was designed "to regulate apprenticeship programs." *Id.* at 1038. Here, in contrast, the D.C. Circuit recognized that the Executive Order was designed to further the proprietary purpose of "ensur[ing] the most effective use of [government] funds." Pet. App. 11a. Moreover, while the law in *Dillingham* was perceived as one that had an impact beyond the public works projects on which apprentices were employed, the D.C. Circuit concluded that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the

government." *Id.* at 13a (bracketed material in original). In any event, the Ninth Circuit sustained the law in *Dillingham*, notwithstanding its regulatory character, on the ground that the law was consistent with the NLRA, see 190 F.3d at 1038-1041, thus reaching the same ultimate outcome as the D.C. Circuit did here.

Furthermore, even if the NLRA preemption doctrines and *Boston Harbor* were understood to impose limitations on the manner in which state or local governments may make proprietary decisions (*i.e.*, that they must act on a project-by-project basis), it does not follow that any such limitations would apply to the President. Another Act of Congress, the Procurement Act, vests the President with the authority to make decisions and establish policies on proprietary matters for the Executive Branch, and Article II of the Constitution vests the President with authority to superintend the officers of the Executive Branch in performing their duties under the various laws, including those governing grants, that they are charged with administering.

In sum, the court of appeals correctly held that the Executive Order, which involves the same sort of decision that *Boston Harbor* recognizes to be proprietary, is the action of the government as a market participant, not as a regulator. That holding is fully consistent with the decisions of this Court and other courts of appeals.

2. Petitioners further contend that the Executive Order, if viewed as a regulatory measure, would be subject to preemption under the NLRA. The court of appeals, having recognized that the Executive Order is proprietary, did not address that question, except to observe in passing that, under circuit precedent, NLRA

preemption principles apply to regulatory acts of the Executive Branch of the National Government, as well as to regulatory acts of a state or a local government. See Pet. App. 10a n.* (citing *Chamber of Commerce*, 74 F.3d at 1335). Accordingly, if this Court were to grant certiorari and reverse on the first question presented in the petition (contrary to the government's argument above), the appropriate course would be to remand the case to the court of appeals to consider whether, or how, NLRA preemption principles apply to the Executive Order. See, *e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001); *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999); *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n.5 (1998).

Even if the Executive Order were viewed as regulatory, rather than proprietary, it would not follow that the Executive Order is subject to ordinary NLRA preemption analysis, much less that it fails that analysis. To be sure, the D.C. Circuit held in *Chamber of Commerce* that the doctrine of NLRA preemption articulated in *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists*), "applies to federal as well as state action." 74 F.3d at 1334; see *id.* at 1337-1338 (concluding that an Executive Order that denied government contracts to firms that hired permanent replacements for striking workers was invalid under the *Machinists* doctrine). But the conclusion in *Chamber of Commerce* that *Machinists* preemption should be imported into this quite different setting ignores the distinct origins of *Machinists* preemption as a restraint on state and local governments by operation of the Supremacy Clause.

In *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), the Court explained that, in enacting the NLRA, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.* at 488. Applying that precept, the Court concluded that the National Labor Relations Board had impermissibly attempted to regulate tactics that Congress had intended to leave free from regulation. Subsequently, in *Machinists*, the Court held that, in light of the NLRA's implied limitations on the Board's regulatory authority, parallel limitations apply to the States under the Supremacy Clause. See 427 U.S. at 146.

Insurance Agents and the subsequent line of preemption cases thus flow from the implicit limitations on the regulatory authority that the NLRA vests in the National Labor Relations Board. The absence of regulatory authority under the NLRA cannot logically provide a basis for invalidating action of the President that is independently authorized by Article II of the Constitution or by another Act of Congress. It is particularly anomalous to conclude, as the court of appeals did in *Chamber of Commerce*, that action of the President that is authorized by Article II and the Procurement Act is invalid, on the theory that the action involves matters that the NLRA intends to leave unregulated by the National Labor Relations Board and that the Supremacy Clause requires to be unregulated by the States. The NLRA vests regulatory authority in the Board. Article II gives the President general supervisory power over the Executive Branch, and the Procurement Act gives the President proprietary authority over the government's acquisition of property and services. Those distinct grants of author-

ity can and should be read harmoniously. See generally *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995).

Moreover, the Executive Order does not violate *Machinists* preemption principles. In arguing to the contrary, petitioners assert (Pet. 29) that "whereas the NLRA explicitly authorizes construction managers and construction unions to freely negotiate PLAs, the Executive Order negates that explicit authorization by prohibiting the[ir] negotiation." That argument is inconsistent with the reasoning of *Boston Harbor*. As explained above, the Court recognized in that case that governments, like private actors, may decide to enter into PLAs on their own construction projects. It necessarily follows that governments, like private actors, may decide *not* to enter into PLAs on such projects, and may direct their construction managers not to negotiate such agreements. (Under the Executive Order, contractors and construction unions are free to enter into PLAs, if they independently choose to do so. See Pet. App. 75a.) Nor does the Executive Order involve the regulation of "economic weapons," *Machinists*, 427 U.S. at 141, the protection of which has been the primary focus of the *Machinists* doctrine.[4]

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[4] Petitioners also argue (Pet. 29) that the Executive Order violates the separate preemption doctrine articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959), which applies to state or local regulation of activities that arguably "are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." The Executive Order, in contrast, concerns an activity that is permitted under Section 8, but that is neither protected under Section 7 nor prohibited under Section 8. 29 U.S.C. 157, 158. Moreover, in a large number of its applications (including the Wilson Bridge project), the Executive Order applies to contracts between two government entities, neither of which is

In any event, because the court of appeals correctly held that the Executive Order is proprietary, this case does not provide an appropriate occasion to consider whether, or to what extent, NLRA preemption principles apply to actions of the Executive Branch that cannot be so characterized.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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subject to the NLRA. It would be remarkable to conclude that a contract between two entities, neither of which is subject to the NLRA, could be deemed to contravene the NLRA because one party chooses to employ a private agent to supervise construction.

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IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

A. The first question presented by our *certiorari* petition is whether Executive Order No. 13202 is, as we contend, "regulatory" government procurement action that is subject to National Labor Relations Act ("NLRA") preemption analysis or, as the D.C. Circuit held, proprietary action that is immune from such analysis.

The Government's "Brief for the Respondents In Opposition" describes such a different Executive Order from the Order challenged in this case and describes and defends such a different D.C. Circuit decision from the decision below as to be an opposition to the grant of our *certiorari* petition in title only.

1. From the outset, the Government mischaracterizes the Executive Order as an Order that embodies "the President's decision not to require or forbid project labor agreements for federal or federally funded construction contracts." Gov. Br. at (I). Had the Order stated such an unexceptionable Executive policy—one consistent with Congress' policy, as stated in the NLRA, which authorizes construction managers and construction unions to negotiate project labor agreements – there would have been no lawsuit in the first place. But what the Executive Order does is "establish [as] the policy of the Government," Pet. App. 2a, a policy contrary to the NLRA's, by flatly prohibiting the negotiation of project-wide prehire collective bargaining agreements that bind all contractors and subcontractors on federal and federally assisted projects.[1]

---

[1] Section 1 of the Executive Order directs federal agencies to ensure that neither the agency nor its construction manager shall include in its "bid specifications, project agreements, or other controlling documents" for a construction project the kind of clause expressly authorized by NLRA § 8(e), one that "require[s] . . . contractors [and] subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction projects(s)." Pet. App.

As the Government would have it, the project labor agreements authorized by the NLRA—and left untouched by the Executive Order—are simple "pre-hire collective bargaining agreement[s] that [are] negotiated between *a contractor* on a construction project and *one or more unions*." Gov. Br. at 2 (emphasis added). But an NLRA-authorized "project labor agreement" is, instead, a comprehensive prehire collective bargaining agreement, binding on all the contractors and subcontractors later hired onto the project, that is negotiated by a construction manager or general contractor that has the authority to determine the labor relations terms for the entire project, and the unions representing all of the trades that will work under the construction manager/general contractor's control. And, it is precisely such agreements that the Executive Order bans.[2]

2. The Government then seeks to leverage its mischaracterization of the Executive Order into a mischaracterization of our position and of the D.C. Circuit's decision.

74a. Section 3 requires federal contracting agencies to impose the same restrictions on recipients of federal assistance and their construction managers. *Id.* at 75a.

[2] The Government's claim that the Executive Order "specifically provides that contractors and subcontractors on federal and federally funded construction projects are not prevented from voluntarily entering into PLAs with labor organizations," Gov. Br. at 3, *citing* E.O. 13202 § 1(c), Pet. App. 75a, is thus a play on words that denies the term "PLA" its meaning. As we pointed out in the *certiorari* petition (at 7-8), the "permission" § 1(c) of the Order grants contractors and subcontractors to devise and implement their own labor relations policies *after* the bids for contracts and subcontracts are awarded and without any assistance from a construction manager, is not the equivalent of—nor does it even approximate—the permission the NLRA grants to construction managers/general contractors to negotiate prehire collective bargaining agreements prior to the bid awards, which are binding on all the contractors and subcontractors who later receive those bid awards.

As the Government puts it,

> Petitioners do not dispute that the President's decision neither to require nor to prohibit a PLA on a single federal (or federally funded) construction project is proprietary, and thus does not implicate principles of NLRA preemption. Petitioners contend, however, that the same decision . . . applicable to all such projects, is transformed into a regulatory one. [Gov. Br. 8.]

With that headway, the Government proceeds to defend what it calls "[t]he court of appeals' contrary holding." *Id.*

To begin, we did not opine, one way or another, on whether the "President's decision neither to require nor to prohibit a PLA on a single federal (or federally funded) construction project is proprietary"—and then argue that the "same decision . . . applicable to all such projects is transformed into a regulatory one"—for the commonsense reason that Executive Order No. 13202 does not embody any such decision.

Rather, as we summarized it in the *certiorari* petition, our proprietary/regulatory dichotomy argument—which rests on the analysis in *Building and Construction Trades Council v. Associated Builders and Contractors of Mass./R.I.*, 507 U.S. 218, 228-30 (1991) ("*Boston Harbor*")—is this:

> [A] purchaser participating in the market who demands that its suppliers conduct their affairs in a specified manner (i) acts as a "regulator" when its demand is based on the purchaser's "policy concerns"—in this context, its labor policy concerns—and is to further its interest in effectuating its policy preferences; and (ii) acts as a "typical proprietor" when its demand is based solely on its "profit motive" interest—its interest in purchasing a good or service efficiently and effectively—and not at all on its regulatory interest "in setting policy." The most essential point is that when government procurement action "set[s] policy," it has a hallmark of government regulatory action, and that when

> government procurement action "set[s] policy" in an area where Congress has set policy through an exclusive regulatory statute, it has a hallmark of government action that requires preemption analysis and review—and that cannot be categorically immunized from such analysis and review. [Pet. at 23.]

On the pretense that we argued something quite different, the Government's Brief offers no response to that argument.

Equally to the point, the D.C. Circuit's holding is not one "contrary" to the simplistic argument the Government wrongly attributes to us. It is, instead, the following:

> A condition that the Government imposes in awarding a contract or in funding a project is regulatory *only* when, as the Supreme Court explained in *Boston Harbor*, it "addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." 507 U.S. at 228-229. Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the government." Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory." [Pet. App. 13a (emphasis added).]

As we pointed out in the *certiorari* petition (at 24-26), this holding is wrong in at least three regards. *First*, it rests on a misreading of the passage from *Boston Harbor* that the D.C. Circuit quotes. *Second*, it distorts the essential point of *Boston Harbor*—that government procurement action is proprietary when the government "acts as a market participant with no interest in setting policy," 507 U.S. at 229—into a point, contrary to the basic understanding of government regulation, that government procurement action is proprietary when the government acts *with an interest in setting policy*

for the class of private entities providing goods/services for the government, while they are providing those goods/services. And *third,* it takes the proprietary/regulatory dichotomy—a means of insulating from unwarranted preemption attacks government procurement action that is focused on the government's proprietary interests—and transforms that dichotomy into a means of insulating from preemption scrutiny government procurement action that is, in reality, policymaking in areas in which Congress has already enacted legislative policy.

Again, on the pretense that the D.C. Circuit's holding is something different than it is, the Government's brief does nothing to justify the holding as actually stated by that court or to respond to our showing that the Court of Appeals' elaboration of the proprietary/regulatory dichotomy is unsound in every particular.

3. The Government's denial that the D.C. Circuit's decision here is in conflict with the Ninth Circuit's decision in *Dillingham Const. N.A. Inc. v. County of Sonoma,* 190 F.3d 1034 (9th Cir. 1999), is also bottomed on mischaracterizing the decisions. According to the Government, the two decisions turn not on contrary analyses but on contrary factual findings. By the Government's account, the D.C. Circuit's proprietary action conclusion rests on a factual finding that the Executive Order's ban on PLAs was "designed to . . . 'ensur[e] the most effective use of [government] funds,'" while the *Dillingham* court's regulatory action conclusion rests on a factual finding that California's application of apprenticeship standards to public contractors was designed not to ensure the most effective use of government funds, but to accomplish a different result. Gov. Br. at 12. Neither of these decisions, however, hinged on such factual findings.

As we have noted, the D.C. Circuit's proprietary action conclusion rests on that court's novel elaboration of the proprietary/regulatory dichotomy: a procurement action is

regulatory "only when . . . it address[es] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." Pet. App. 13a (internal quotations omitted). On this legal rule—and not on any finding that the Executive Order was designed to ensure the most effective use of government funds—the D.C. Circuit concluded that "[b]ecause the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'" *Id.*[3]

The Ninth Circuit, by contrast, adhering to *Boston Harbor's* teachings, rejected California's market participant argument in these terms:

> The . . . law applies uniformly to all public works contracts executed in the State of California and is a mechanism through which the State regulates apprenticeship programs and the employment of apprentices on public works projects.
>
> * * *
>
> In contrast to [*Boston Harbor*,] the State in this case did not establish the apprentice prevailing wage law specifically for the detention facility project and the

[3] Indeed, contrary to the Government's description of the D.C. Circuit's decision, that court did not find, as a factual matter, that the PLA ban was "designed to . . . 'ensur[e] the most effective use of [government] funds.'" Gov. Br. at 12. Instead, in rejecting our argument that the Government lacked any proprietary interest in federally assisted construction projects that the Government does not actually own or control, the Court of Appeals wrote that "the Government unquestionably is the proprietor of its own funds, and *when* it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." Pet. App. 11a (emphasis added). The D.C. Circuit's general observation regarding the interests of a "lender or benefactor" hardly qualifies as a holding that this particular Executive Order was intended to "ensure the most effective use of [government] funds."

> State was not motivated by management concerns when it adopted the apprentice prevailing wage law. The State's purpose in enacting and enforcing the apprentice prevailing wage law was to regulate apprenticeship programs and wages paid on public works projects. [190 F.3d at 1038.]

As we explained in our *certiorari* petition (at 16), the Ninth Circuit thus held that government procurement action that sets an across-the-board labor relations rule that governs employers and employees while they are doing work on government construction projects is classic government regulatory action, "subject to NLRA preemption [analysis]." 190 F.3d at 1038. And that holding is in the most direct conflict with the D.C. Circuit's holding here.

Nor does the Government's dismissal of the conflict we assert between the decision below and *Cardinal Towing v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999), and *Sprint Spectrum v. Mills*, 283 F.3d 404 (2d Cir. 2002)—on the theory that "although the[se] courts noted the narrow scope of the challenged requirements in finding them to be proprietary, the courts would not necessarily have held the requirement to be regulatory had they been applied more broadly," Gov. Br. at 12—withstand scrutiny. As we showed in the *certiorari* petition (at 18-19), the Fifth Circuit's *Cardinal Towing* proprietary/regulatory test—which the Second Circuit adopted in *Sprint Spectrum*—is not merely different from the D.C. Circuit's test, it is different in an outcome-determinative way—in a way that, when applied to Executive Order No. 13202, requires the conclusion that the Executive Order constitutes regulatory, not proprietary, action.

* * *

In short, all the points made in our *certiorari* petition stand, and those points call for this Court to grant the petition.

B. The second question our petition presents is whether, as we contend (and as the District Court held), Executive Order No. 13202 is a government procurement action that, under the NLRA's preemption principles, improperly intrudes into the exclusive labor relations regulatory scheme established by Congress. We noted that, in light of its ruling on the threshold proprietary/regulatory dichotomy issue, the D.C. Circuit did not reach this ultimate merits question, but that the following considerations militate in favor of its consideration by this Court: the question is a pure question of law that is closely related to the first question presented and that has great practical significance and large ramifications. Pet. at 26. And, we then went on to outline the arguments demonstrating that the Executive Order does improperly intrude into the field Congress occupied by the NLRA. *Id.* at 27-30.

The Government makes three points in its response, none of which is availing.

First, the Government asserts that

> if this Court were to grant *certiorari* and reverse on the first question presented in the petition . . . , the appropriate course [since the D.C. Circuit did not reach the second question] would be to remand the case to the court of appeals to consider whether, or how, NLRA preemption principles apply to the Executive Order. [Gov. Br. at 14.]

Certainly, in the run of cases, that would be the "appropriate" course. But it is not in any sense the required course, and for the reasons we stated in the *certiorari* petition—which the Government does not address, much less rebut—it is not the appropriate course in this case.

Second, the Government notes that "the D.C. Circuit held in *Chamber of Commerce* [*v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996)], that the doctrine of NLRA preemption articulated in [*Machinists*] *v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), . . . 'applies to

federal as well as state action,'" and argues that *Chamber of Commerce* is in error in "ignor[ing] the distinct origins of *Machinists* preemption as a restraint on state and local governments by operation of the Supremacy Clause." Gov. Br. at 14. It is, says the Government,

> particularly anomalous to conclude, as the court of appeals did in *Chamber of Commerce*, that action of the President that is authorized by Article II [of the Constitution] and the Procurement Act is invalid, on the theory that the action involves matters that the NLRA intends to leave unregulated by the National Labor Relations Board and that the Supremacy Clause requires to be unregulated by the States. [*Id.* at 15.]

The anomaly is, in fact, on the other side. As the Government notes in developing its argument, the *Machinists* preemption doctrine rests on the recognition that "in enacting the NLRA, 'Congress intended that the parties should have wide latitude in their negotiations, unrestricted by *any government power* to regulate the substantive solution of their differences." Gov. Br. at 15, *quoting NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960) (emphasis added). Given that congressional intent, what would be anomalous would be to recognize an independent procurement power in the Executive to superimpose its labor relations policies on the system of collective bargaining established by the NLRA.

As its third and final point, the Government claims that "the Executive Order does not violate *Machinists* preemption principles." Gov. Br. at 16. After noting our argument that the Order is an improper Executive regulation of collective bargaining in that "whereas the NLRA explicitly authorizes construction managers and construction unions to freely negotiate PLAs, the Executive Order negates that explicit authorization by prohibiting the[ir] negotiation," the Government states that the argument is "inconsistent with the reasoning of *Boston Harbor*." *Id.* But nothing the *Boston*

Harbor Court said or did even suggests that governments can regulate collective bargaining between construction managers, as employers in the construction industry, and construction unions by prohibiting those parties from negotiating a kind of collective bargaining agreement that the NLRA permits them to negotiate. And, the notion that government action that flatly prohibits negotiation of a particular kind of collective bargaining agreement that the NLRA permits is somehow more compatible with the NLRA's regulatory scheme than government action that indirectly affects the negotiation of agreements by regulating a particular "economic weapon" (*id.*) gets the *Machinists* principle exactly backwards.

* * *

We would be derelict if we limited ourselves to responding only to the substance of the Government's argument on the second question presented by the *certiorari* petition, and failed to note the implications of that argument. For what is most significant at this jurisdictional stage is that the Government takes the position that the Executive has a plenary procurement power to impose its labor relations policy on government contractors without any regard to the conflict between the Executive's policies and the labor relations policy stated in the NLRA. That expansive claim of power underscores the importance of the second question we present and the need for this Court to address and decide it.

CONCLUSION

For the reasons stated in the *certiorari* petition and in this reply brief, the petition should be granted.

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No. 02-527

IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of this Court's Rules, Petitioners file this supplemental brief to call the Court's attention to the decision of the Supreme Court of Ohio in *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.*, ____ Ohio St. 3d ____ , 2002 - Ohio - 7213 (Dec. 27, 2002). The Ohio Supreme Court's opinion posted to its website as a manuscript document is set out as an appendix to this brief. Supp. Br. App. 1sa-36sa.

1. The Ohio Supreme Court's decision is highly pertinent here in three regards:

- *First*, the Ohio Court's decision underlines the importance of the recurring *Gould/Boston Harbor*[1] regulatory/proprietary dichotomy question raised by, and decided in, the *Ohio Building Trades* case and raised by this case and presented in our *certiorari* petition.[2]
- *Second*, the Ohio Court's decision further deepens the conflict on that regulatory/proprietary dichotomy question we outlined at pp. 14-21 of our *certiorari* petition.
- *Third*, the Ohio Court's decision provides well reasoned support, grounded in this Court's decisions, both for our contention, on the first question we present, that Executive Order No. 13202, at issue here, is regulatory government procurement action and not, as

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[1] *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986); *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993) ("*Boston Harbor*").

[2] The first question presented in our *certiorari* petition is

> Whether Executive Order No. 13202 is "regulatory" government procurement action that is subject to preemption analysis or "proprietary" action that is immune from such analysis. . . . [Pet. i]

the D.C. Circuit held, proprietary action, *see* Pet. 21-26; and for our contention, on the second question we present, that the Executive Order is, and should be adjudicated to be, invalid as an improper Executive intrusion into the exclusive regulatory scheme Congress established in the National Labor Relations Act, *see* Pet. 26-30.

2. The *Ohio Building Trades* case and the Ohio Supreme Court's decision could not be more closely in point.

In the instant case we challenge the validity of Executive Order No. 13202—which flatly prohibits construction managers retained by federal agencies or recipients of federal assistance from negotiating project labor agreements ("PLAs") specifying that all contractors and subcontractors working on a construction project must agree to adhere to the PLA—as a "regulatory" government procurement action that, under NLRA preemption principles, improperly intrudes into the regulatory field Congress occupied in that Act.

In the *Ohio Building Trades* case, the plaintiffs brought a parallel NLRA preemption challenge to the validity of a parallel Ohio procurement provision—"R.C. Chapter 4116, as enacted by Am.H.B. No. 101 of 123rd General Assembly, which flatly prohibits public authorities from entering into or enforcing project labor agreements on public construction projects," Supp. Br. App. 2sa.

In the instant case the D.C. Circuit rejected our challenge to the Executive Order on the ground that the Order is a "proprietary" government procurement action not subject to preemption analysis. According to the Court of Appeals "[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory only when . . . it addresses employer conduct unrelated to the employer's performance of contractual obligations to the [Government]," and "[b]ecause the Executive Order does not address the use of PLAs on projects unrelated to those in which the

Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as regulatory." Pet. App. 13a.

In contrast, in the *Ohio Building Trades* case, the Ohio Supreme Court upheld the challenge to Ohio R.C. Chapter 4116.

The Ohio Court—after a thorough discussion of NLRA §§8(e) and (f), 29 U.S.C. §158(e) and (f), and this Court's decisions interpreting their authorization of the negotiation of PLAs in the construction industry, Supp. Br. App. 6sa - 13sa, and a painstaking review of this Court's decisions articulating and elaborating the *Garmon* and *Machinists*[3] NLRA preemption doctrines, Supp. Br. App. 14sa-24sa—held:

> [W]e must conclude that Section 8(f) and the construction-industry proviso to Section 8(e) are clear manifestations of Congress's intent to preclude the states from regulating PLAs in the construction industry. . . . [I]t makes no further difference whether we engage in a *Garmon* or *Machinists* analysis. The application of either rule necessitates a withdrawal of state power, except where the state acts as a market participant. [Supp. Br. App. 24sa.]

As the Ohio Court said, that holding brought that court to "the final and decisive issue in this case, which is whether R.C. Chapter 4116 amounts to government regulation or constitutes proprietary conduct on the part of the state." Supp. Br. App. 24sa. And, on that issue—after a close analysis of this Court's *Boston Harbor* decision, Supp. Br. App. 24sa - 26sa, and of the lower court decisions elaborating

---

[3] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Machinists v. Wisconsin Employment Relations Commission*, 421 U.S. 132 (1976).

the *Gould/Boston Harbor* regulatory/proprietary dichotomy, Supp. Br. App. 26sa - 33sa—the Ohio Court concluded:

> We cannot conceive of R.C. Chapter 4116 as anything but regulation. R.C. Chapter 4116 is all about labor policy. Its stated purpose is "to prohibit public authorities from imposing certain labor requirements as a condition of performing public works." Preamble to 1999 Am.H.B. No. 101. Rather than constituting proprietary conduct on the part of the state, R.C. Chapter 4116 essentially prohibits the state, its contracting authorities, and any institution supported in whole or part by public funds from engaging in proprietary activity when purchasing construction services or directly employing labor by prohibiting them from entering into or enforcing a PLA on any public construction project regardless of economic or other proprietary concerns. . . .
>
> R. C. Chapter 4116 is a blanket, across-the-board prohibition that precludes any sort of ad hoc determination as to the benefits or advantages of utilizing a PLA on a particular project. It is, therefore, "'tantamount to regulation' or policymaking." *Boston Harbor*, 507 U.S. at 229, 113 S. Ct. 1190, 122 L.Ed. 2d 565. [Supp. Br. App. 33sa.]

3. We believe that the Ohio Supreme Court's rationale for its conclusion that Ohio R.C. Chapter 4116 is government regulation and not proprietary conduct on the part of the State —which goes directly to the first question presented by our *certiorari* petition and which rejects as unsound the D.C. Circuit's regulatory/proprietary dichotomy theory in this case —is worthy of special attention.

The Ohio Court's conclusion in that regard rests on three salient points:

> • First, *Boston Harbor's* discussion of the regulatory/proprietary dichotomy is most fairly read to

"suggest[] that a state would be acting as a regulator or policymaker, rather than as a purchaser, proprietor, or market participant, were it to impose an across-the-board rule that either requires or prohibits the use of PLAs on all public construction projects," Supp. Br. App. 26sa; *see also id.* at 24sa-26sa (analyzing *Boston Harbor*, 507 U.S. at 226-232).

• Second, the lower federal court regulatory/proprietary dichotomy decisions have generally reached "similar conclusions" as to *Boston Harbor's* meaning. Supp. Br. App. 26sa; see *id.* at 26sa-29sa (discussing these authorities). The Ohio Supreme Court cited in particular *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)—which holds that President Clinton's "Permanent Striker Replacement" Executive Order is a regulatory government procurement action—and quoted extensively from the *Chamber of Commerce* Court's explanation of its holding as follows:

> "The premise on which the [*Boston Harbor*] Court's * * * analysis [of the character of the state's actions] rested, then, was that the Massachusetts governmental entity, [the Water Resources Authority], was not seeking to set general policy in the Commonwealth; it was just trying to operate as if it were an ordinary general contractor whose actions were 'specifically tailored to one particular job, the Boston Harbor clean-up project.' [507 U.S.] at 232, 113 S.Ct. at 1198, 122 L.Ed.2d 565. Surely, the result would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into collective bargaining agreements with the union or its Massachusetts-wide counterpart containing § 8(e) pre-hire agreements.

Accordingly, we very much doubt the legality of President Bush's Executive Order 12,818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements under § 8(f).

"It does not seem to us possible to deny that the President's Executive Order [in this case, i.e., the Clinton Executive Order case] seeks to set a broad [labor] policy * * *. The President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter. * * * Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy. It cannot be equated to the *ad hoc* contracting decision made by MWRA in seeking to clean up Boston Harbor." (Footnote omitted.) *Id.*, 74 F.3d at 1336-1337. [Supp. Br. App. 27sa - 28sa.]

• Third, the "contrary" decisions in the instant case and in *George Harms Constr. Co. Inc. v. New Jersey Turnpike Auth.*, 137 N.J. 8, 644 A.2d 76 (1994) can not be squared with *Boston Harbor's* reasoning. Supp. Br. App. 30sa - 33sa. The Ohio Court took issue with those decisions in the following terms:

[T]he D. C. Circuit essentially reasoned, as did the New Jersey high court in *George Harms Constr. Co., Inc.*, that the government acts as a proprietor, rather than a regulator, when it makes "just 'the type of decision regarding the use of labor agreements that a private project owner would be free to make.' " *Allbaugh*, 295 F.3d at 35, quoting the government's brief. According to the court, the government has acted in a propriety capacity despite the "blanket, across-the-board" prohibition of Executive Order 13,202 "'because "the only decisions governed by the

executive order are those that the federal government makes as [a] market participant.'" *Id.*, quoting the government's brief.

This reasoning, we believe, places the proverbial cart before the horse. These courts assume that a state acts as a market participant by doing what a private actor may do under the NLRA. But the gist of *Boston Harbor* is that a state may act as a private contractor would act *when it acts as a market participant.* Otherwise, the state would be permitted to regulate within a protected zone because a private actor may do so. As the New Jersey Supreme Court points out, for example, a private corporation may in its bylaws or elsewhere decide as a matter of policy never to utilize a PLA when purchasing construction services without running afoul of the NLRA. But this is not because such a decision is inherently indicative of proprietary activity. Indeed, the private contractor-developer in this situation would be acting not as a typical contractor would act in the furtherance of its proprietary interests, but as a "regulator" of the construction market. Instead, a private corporation or other legal entity may make such a policy decision without violating the NLRA because the NLRA does not preclude a private actor from attempting to regulate in an area reserved for market freedom or NLRB jurisdiction. [Supp. Br. App. 31sa-32sa (emphasis in original).]

Indeed, as the Ohio Court noted, its critique of the D.C. Circuit's decision here is foreshadowed by the *Boston Harbor* Court's explanation of the distinction between private party regulatory action and government regulatory action. *See* Supp. Br. App. 32sa-33sa quoting 507 U.S. at 229.

We submit that the Ohio Supreme Court was right in its reading of *Boston Harbor*; right in concluding that, under *Boston Harbor*, Ohio R.C. Chapter 4116's flat prohibition on PLAs on Ohio public construction projects is regulatory government action; and right in rejecting, as contrary to *Boston Harbor's* reasoning, the D.C. Circuit's conclusion that Executive Order 13202's flat prohibition on PLA's on federal and federally assisted projects is proprietary government action. And, because all that is so, we submit that the Ohio Supreme Court's *Ohio Building Trades* decision provides added reason for the Court to grant our *certiorari* petition in order to review and correct the D.C. Circuit's erroneous decision in the instant case.

CONCLUSION

For the reasons stated in the *certiorari* petition, in Petitioners' reply brief and in this supplemental brief, the petition should be granted.

Respectfully submitted,

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SUPREME COURT OF OHIO

This opinion is "SUBJECT TO FURTHER EDITING." It has been posted to the website of the Supreme Court of Ohio as a manuscript document in the interest of disseminating it to the public on an expedited basis. This document will be replaced with the final version when the final version becomes available. Please call suggested corrections to the attention of the reporter's office at reporter@sconet.state.oh.us.

OHIO STATE BUILDING & CONSTRUCTION TRADES COUNCIL *et al.*,
Appellants,

v.

CUYAHOGA COUNTY BOARD OF COMMISSIONERS *et al.*,
Appellees.

[Cite as *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.*, ___ Ohio St.3d ___, 2002-Ohio-7213.]

Labor and industry—Public construction projects—Sections 8(e) and (f) of the National Labor Relations Act preempt R.C. Chapter 4116—Enforcement of R.C. Chapter 4116 enjoined.

(No. 2001-2036—Submitted September 25, 2002—Decided December 27, 2002.)

APPEAL from the Court of Appeals for Cuyahoga County, Nos. 77242 and 77262, 2001-Ohio-4228.

SYLLABUS OF THE COURT

Sections 8(e) and (f) of the National Labor Relations Act, as enacted by the 1959 Landrum-Griffin Act, Sections 158(e) and (f), Title 29, U.S.Code, preempt R.C. Chapter 4116, as enacted by Am.H.B. No. 101 of 123rd General Assembly, which flatly prohibits public authorities from entering into or enforcing project labor agreements on public construction projects.

ALICE ROBIE RESNICK, J.

This action for declaratory and injunctive relief challenges the constitutionality of R.C. Chapter 4116, which was enacted by Am.H.B. No. 101 of the 123rd General Assembly, effective October 11, 1999, "to prohibit public authorities from imposing certain labor requirements as a condition of performing public works." Preamble to 1999 Am.H.B. No. 101.

The following facts, though gleaned from scant evidence, are sufficient for purposes of the present inquiry. Between September 1998 and July 1999, defendant-appellee Cuyahoga County Board of Commissioners ("board") held several meetings with Loree Kenneth Soggs, executive secretary to plaintiff-appellant Cleveland Building & Construction Trades Council ("CBCTC"), to discuss the propriety of establishing a project labor agreement ("PLA") to govern construction of the county's proposed new juvenile detention center.

As proposed by Soggs, the PLA for the detention center would be typical of PLAs that CBCTC had negotiated on other construction projects, which generally contain union security clauses, provisions establishing standard work rules and prohibiting strikes, lockouts, slowdowns, and other work stoppages during the course of construction, a provision regarding the use of CBCTC's hiring halls to supply the project's labor force, and possibly a requirement that the various contractors on site become signatory to individual

collective bargaining agreements with the affiliated local unions of the CBCTC. The board would then impose a requirement, presumably through its bid specifications and subsequent agreements with individual contractors, that "successful bidders agree to enter into a project labor agreement * * * [and] that contractors and/or subcontractors on the Project agree to abide by [its terms]."

In his testimony at the preliminary injunction hearing, Soggs indicated that the board was "very receptive" to the idea of developing such an agreement for the detention center project and stated that "the commissioners individually * * * told me they were in favor of the project labor agreement." As the board was considering the issue, however, Am.H.B. No. 101 was winding its way through the legislative process. The bill was passed by the Ohio House of Representatives on May 12, 1999, and by the Ohio Senate on June 23, 1999. When Governor Bob Taft's intention to neither sign nor veto the bill was announced in a release dated June 30, 1999, it was clear that Am.H.B. No. 101 would become law without his signature pursuant to Section 16, Article II of the Ohio Constitution.

Accordingly, in a letter dated July 2, 1999, the county's deputy administrator, Lee A. Trotter, informed Soggs as follows:

"As you know the County had been working toward developing a Project Labor Agreement for its proposed new Juvenile Detention Center since 1998. We have had several meetings and exchanged information geared toward identifying the key benefits of such an agreement for both the County and The Cleveland Building and Construction Trades Council.

"We have recently been informed of the passage of H.B. 101, prohibiting a public authority from requiring that a bidder, contractor, or subcontractor become a party to a

project labor agreement as a condition of being awarded a public improvement project. The passage of H.B. 101 prohibits the County from pursuing the development and execution of the proposed agreement. Should conditions change allowing Project Labor Agreements we will immediately revisit this issue."

On September 9, 1999, CBCTC, along with plaintiffs-appellants Ohio State Building & Construction Trades Council and International Union of Operating Engineers, Local 18, commenced the present action by filing a verified complaint in the Cuyahoga County Court of Common Pleas against the board and defendant-appellee state of Ohio. The complaint essentially charges that Am.H.B. No. 101, as codified at R.C. Chapter 4116, is preempted by the National Labor Relations Act ("NLRA"), Section 151 *et seq.*, Title 29, U.S.Code and, therefore, violates the Supremacy Clause of the United States Constitution.

Finding that the NLRA leaves the responsibility for "the negotiation and administration of * * * prehire collective bargaining agreements [to] labor organizations" and that "[t]hat responsibility * * * is precluded by Amended House Bill 101," the trial court declared R.C. Chapter 4116 invalid under the Supremacy Clause and permanently enjoined its enforcement.

In a split decision, the court of appeals reversed the judgment of the trial court. In so doing, the court of appeals found that R.C. 4116.02 "does not on its face or by its application prohibit a public authority from entering into a PLA." Instead, the statute prohibits a public authority only "from entering into a PLA with objectionable terms," as set forth in R.C. 4116.02(A) and (B). According to the appellate court, "a PLA can be drafted without these terms and still be valid and enforceable." Thus, the court concluded, "there is no real controversy that warrants declaratory relief."

The court of appeals also considered whether the statute would be preempted by the NLRA if it were interpreted to preclude a public authority from entering into a PLA. The court concluded that even under this interpretation, "the statute is not * * * preempted by the NLRA because the State is not acting as a market regulator but rather is acting as a market participant." The gist of the court's reasoning is that the state, acting as proprietor, may choose whether to enter into a PLA without running afoul of the NLRA, and that this choice need not be made on a project-by-project basis. Instead, the state may do as it has done in R.C. Chapter 4116, which is "to choose, in a summary manner, never to enter into a PLA on any public construction project when it acts as a market participant." And since "[t]he statute does not impinge on the rights of any [private] entity to enter into a PLA * * *, it does not frustrate the intent of Congress to permit the use or non-use of PLAs to be 'controlled by the free play of economic forces.' "

The cause is now before this court pursuant to the allowance of a discretionary appeal.

When Governor Taft announced his intention to allow Am.H.B. No. 101 to become law without his signature, he explained:

"I am concerned that this legislation would not survive a constitutional challenge based on the supremacy clause of the U.S. Constitution. Our legal research shows the courts have, in the past, found that the regulation of project labor agreements is a federal responsibility under the National Labor Relations Act and that the state is therefore preempted from legislating in this area." Communications Release (June 30, 1999), Office of the Governor.

For the reasons that follow, we agree with the Governor's assessment of Am.H.B. No. 101's constitutionality and hold that Sections 8(e) and (f) of the NLRA, as enacted by the

1959 Landrum-Griffin Act, Sections 158(e) and (f), Title 29, U.S.Code, preempt R.C. Chapter 4116's blanket prohibition against the enforcement of PLAs on public works.

Section 8(e) of the NLRA provides:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [sic] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." (Italics sic.) Section 158(e), Title 29, U.S.Code.

Section 8(e) is aimed at so-called "hot cargo" agreements, that is, agreements between a union and employer that require the employer to boycott the goods or services of another party. *Natl. Labor Relations Bd. v. Internatl. Longshoremen's Assn., AFL-CIO* (1985), 473 U.S. 61, 74-75, 105 S.Ct. 3045, 87 L.Ed.2d 47. Prior to 1959, the NLRA provided certain protections against secondary boycotts, but there were gaps in those protections. In particular, Section 8(b)(4)(A) prohibited a union from engaging in certain concerted activity to force an employer to cease doing business with a third party. *See* 61 Stat. 141. In *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. Natl. Labor Relations Bd.* (1958), 357 U.S. 93, 98-99, 78 S.Ct. 1011, 2 L.Ed.2d 1186 ("*Sand Door*"), the United States Supreme Court indicated that a union was nevertheless free to persuade an employer to

enter into a hot-cargo agreement so long as it refrained from prohibited concerted activity, and that an employer was legally permitted to comply with such an agreement as long as compliance was voluntary. "Section 8(e), which prohibits hot cargo agreements, was designed to eliminate the loophole created by the *Sand Door* decision." *Woelke & Romero Framing, Inc. v. Natl. Labor Relations Bd.* (1982), 456 U.S. 645, 655, 102 S.Ct. 2071, 72 L.Ed.2d 398.

However, the construction-industry proviso to Section 8(e) was inserted to ensure that agreements limiting the contracting of construction site work remained legal. "To the extent that subcontracting agreements were part of the pattern of collective bargaining in the construction industry [prior to 1959], and lawful, Congress wanted to ensure that they remained lawful." *Woelke*, 456 U.S. at 657, 102 S.Ct. 2071, 72 L.Ed.2d 398.

In *Woelke*, the Supreme Court considered whether the construction-industry proviso applied to protect two union signatory subcontracting clauses that were sought or negotiated in the context of a collective bargaining relationship. One of these clauses would have barred a construction contractor from subcontracting "any work to be done at the site of construction, * * * except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." *Id.*, 456 U.S. at 649, 102 S.Ct. 2071, 72 L.Ed.2d 398, fn. 1. The other provided that "Employers shall not contract any work covered by this Agreement to be done at the site of the construction * * * to any person, firm or company who does not have an existing labor agreement with the Union covering such work." Id. at 650, 102 S.Ct. 2071, 72 L.Ed.2d 398, fn. 3. Finding "ample evidence [in the legislative history] that Congress believed that union signatory contract clauses of the type at issue here were part of the pattern of collective bargaining in the

construction industry," the court in *Woelke* affirmed the decision of the court of appeals "insofar as it holds that the clauses at issue here were sheltered by the proviso." *Id.*, 456 U.S. at 666, 102 S.Ct. 2071, 72 L.Ed.2d 398.

Section 8(f), which was also added to the NLRA by the 1959 Landrum-Griffin Act, Section 158(f), Title 29, U.S. Code, states:

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members * * * because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act [Section 159, Title 29, U.S.Code] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: * * * *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e) [Section 159(c) or (e), Title 29, U.S.Code]." (Italics sic.)

Section 8(f) authorizes so-called "prehire" agreements in the construction industry. "Thus, § 8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner provided for under § 9 of the Act." *Jim McNeff, Inc. v. Todd* (1983), 461 U.S. 260, 266, 103 S.Ct. 1753, 75 L.Ed.2d 830.

Although not entirely coincident, there is a corresponding relationship between the requirements that Section 8(f) permits to be imposed under a prehire agreement and the union signatory subcontracting clauses that are sheltered by the construction industry proviso to Section 8(e). On the one hand, unions often seek protected Section 8(e) subcontracting clauses as part of a Section 8(f) prehire agreement. Indeed, Section 8(f) agreements are "the most common and possibly the only effective means by which such [subcontracting clauses] may be obtained." *Donald Schriver, Inc. v. Natl. Labor Relations Bd.* (C.A.D.C.1980), 635 F.2d 859, 875. On the other hand, "[w]hen a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a § 8(f) agreement—known as a prehire agreement—with the union." *Woelke*, supra, 456 U.S. at 664, 102 S.Ct. 2071, 72 L.Ed.2d 398.

In *Bldg. & Constr. Trades Council of Metro. Dist. v. Assoc. Builders & Contrs. of Massachusetts/Rhode Island, Inc.* (1993), 507 U.S. 218, 230-231, 113 S.Ct. 1190, 122 L.Ed.2d 565 ("*Boston Harbor*"), the high court explained:

"In 1959, Congress amended the NLRA to add § 8(f) and modify § 8(e). Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements. Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of

union hiring halls, prior to the hiring of any employees. 935 F.2d [345], at 356 [case below]; *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-266 (1983). The 1959 amendment adding a proviso to subsection (e) permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657 (1982). Section 8(f) contains a final provision that permits employees, once hired, to utilize the NLRB election process under §§ 9(c) and (e) of the Act, 29 U.S.C. §§ 159(c) and (e), if they wish to reject the bargaining representative or to cancel the union security provisions of the prehire agreement. *See NLRB v. Iron Workers*, 434 U.S. 335, 345 (1978).

"* * *

"It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry. See S. Rep. No. 187, 86th Cong., 1st Sess., 28, 55-56 (1959); H. R. Rep. No. 741, 86th Cong., 1st Sess., 19-20 (1959)."

The prehire collective bargaining agreement that was held to be a valid labor contract under sections 8(e) and (f) in *Boston Harbor* was a PLA prescribing the terms and conditions of employment at a public construction site. That agreement, which was negotiated between the project manager and the building and construction trades council ("BCTC") and then incorporated into a Massachusetts state agency's solicitation of project bids, contained the following

requirements: "recognition of BCTC as the exclusive bargaining agent for all craft employees; use of specified methods for resolving all labor-related disputes; a requirement that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment; the primary use of BCTC's hiring halls to supply the project's craft labor force; a 10-year no-strike commitment; and a requirement that all contractors and subcontractors agree to be bound by the Agreement." Id., 507 U.S. at 221-222, 113 S.Ct. 1190, 122 L.Ed.2d 565. Quoting Chief Judge Breyer's dissent in the court of appeals, the Supreme Court found that this is "'the very sort of labor agreement that Congress explicitly authorized and expected frequently to find.' " *Id.*, 507 U.S. at 233, 113 S.Ct. 1190, 122 L.Ed.2d 565.

This is also the very sort of labor agreement that the board was attempting to negotiate with CBCTC when Am.H.B. No. 101 was passed by the General Assembly and forwarded to the Governor. As enacted by Am.H.B. No. 101, R.C. 4116.02 provides:

"A public authority, when engaged in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements, shall ensure that bid specifications issued by the public authority for the proposed public improvement, and any subsequent contract or other agreement for the public improvement to which the public authority and a contractor or subcontractor are direct parties, do not require a contractor or subcontractor to do any of the following:

"(A) Enter into agreements with any labor organization on the public improvement;

"(B) Enter into any agreement that requires the employees of that contractor or subcontractor to do either of the following as a condition of employment or continued employment:

"(1) Become members of or affiliated with a labor organization;

"(2) Pay dues or fees to a labor organization."

R.C. 4116.03 provides:

"No public authority shall do any of the following:

"(A) Award a contract for a public improvement in violation of section 4116.02 of the Revised Code;

"(B) Discriminate against any bidder, contractor, or subcontractor for refusing to become a party to any agreement with any labor organization on the public improvement that currently is under bid or on projects related to that improvement;

"(C) Otherwise violate section 4116.02 of the Revised Code."

Yet the court of appeals found no "real controversy" in this case because R.C. Chapter 4116 "does not * * * prohibit a public authority from entering into a PLA." Instead, the court found that the statute restricts a public authority only from "entering into a PLA with objectionable terms," that is, a PLA that requires a contractor or its employees to do any of those things listed in R.C. 4116.02(A) and (B). The court reasoned that "these very terms are [not] essential to * * * an effective PLA. On the contrary, a PLA can be drafted without these terms and still be valid and enforceable." Thus, "the statute's restrictions do not effectively prohibit a public authority from entering into a PLA."

This result is surprising, considering that the sponsor of Am.H.B. No. 101, Rep. Ron Young (R-Leroy), in his testimony for the bill before the House Commerce and Labor Committee, specifically maintained that "[t]his important legislation will prohibit so-called 'project labor agreements'

in the State of Ohio" and then proceeded to argue at length as to why "project labor agreements should be prohibited in Ohio."

In any event, we fail to see the relevance of hypothetical prehire agreements that neither trigger the prohibitions in R.C. 4116.02 nor require the shelter of the construction industry exceptions in Section 8 of the NLRA. This case does not involve some abstract or theoretical PLA that imposes none of the requirements or restrictions prohibited under R.C. Chapter 4116. In this case, the board and CBCTC were attempting to negotiate an agreement that would incorporate the very requirements that the statute prohibits. They are now asking whether the NLRA preempts the state from prohibiting this specific type of agreement and, with all due respect to the court of appeals, it is no answer to tell them that R.C. Chapter 4116 permits a different type of agreement.

As others have observed, the court of appeals' position in this case "might be reasonable but for the fact that these 'objectionable terms' prohibited by [R.C. Chapter 4116] * * * are precisely the sorts of outcomes guaranteed to the construction industry through NLRA 8[f] pre-hire agreements." John Lund and Joe Oswald, Public Project Labor Agreements: Lessons Learned, New Directions (Fall 2001), 26 Lab.Stud.J. 1, 3. Regardless of whether R.C. Chapter 4116 leaves public authorities free to enforce some hypothetical PLA that is not involved in the present controversy, the fact remains that the statute expressly prohibits "the very sort of labor agreement that Congress explicitly authorized and expected frequently to find." *Boston Harbor*, supra, 507 U.S. at 233, 113 S.Ct. 1190, 122 L.Ed.2d 565. Thus, we find that there is a "real controversy" in this case as to whether R.C. Chapter 4116 is preempted by the NLRA.

Accordingly, it must be decided whether the NLRA precludes state regulation of PLAs in the construction

industry and, if so, whether R.C. Chapter 4116 is tantamount to regulation or constitutes proprietary conduct on the part of the state.

"Congress' power to pre-empt state law is derived from the Supremacy Clause of Art. VI of the Federal Constitution." *Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 208, 105 S.Ct. 1904, 85 L.Ed.2d 206. "In any case concerning preemption, congressional purpose must be the ultimate focus. *Malone v. White Motor Corp.* (1978), 435 U.S. 497, 504, 98 S.Ct. 1185, 1189-1190, 55 L.Ed.2d 443, 450. The National Labor Relations Act ('NLRA') contains no express preemption provision. 'Where the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' "' *Metro. Life Ins. Co. v. Massachusetts* (1985), 471 U.S. 724, 747-748, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728, 745, quoting *Allis-Chalmers Corp.* [*supra*], 471 U.S. [at] 209, 105 S.Ct. [at] 1910, 85 L.Ed.2d [at] 213-214." *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 350, 691 N.E.2d 655.

But deciphering the extent to which national policy under the NLRA displaces state law requires "a more complicated and perceptive process than is conveyed by the delusive phrase, 'ascertaining the intent of the legislature.' " *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon* (1959), 359 U.S. 236, 239-240, 79 S.Ct. 773, 3 L.Ed.2d 775. Congress has established in the NLRA a comprehensive and integrated regulatory framework. In its attempt to devise workable NLRA preemption rules, the Supreme Court has necessarily "been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration." *Id.*, 359 U.S. at 243, 79 S.Ct. 773, 3 L.Ed.2d 775.

Under this scheme, "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency [the National Labor Relations Board], armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242, 79 S.Ct. 773, 3 L.Ed.2d 775. Thus, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. * * * Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776* (1953), 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228. The rationale for NLRA preemption, therefore, is based largely on the notion that "when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy." *Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge* (1971), 403 U.S. 274, 288, 91 S.Ct. 1909, 29 L.Ed.2d 473.

Nevertheless, Congress has neither exercised its full authority to occupy the entire field in the area of labor relations nor clearly delineated the extent to which state regulation must yield to this subordinating federal legislation. See *Weber v. Anheuser-Busch, Inc.* (1955), 348 U.S. 468, 480-481, 75 S.Ct. 480, 99 L.Ed. 546. As the high court went on to explain in *Lockridge, supra*, 403 U.S. at 289-291, 91 S.Ct. 1909, 29 L.Ed.2d 473:

"This has, quite frankly, left the Court with few available options. We cannot declare pre-empted all local regulation that touches or concerns in any way the complex

interrelationships between employees, employers, and unions; obviously, much of this is left to the States. Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application * * *. Further, it is surely not possible for this Court to treat the National Labor Relations Act section by section, committing enforcement of some of its provisions wholly to the NLRB and others to the concurrent domain of local law. Nothing in the language or underlying purposes of the Act suggests any basis for such distinctions. Finally, treating differently judicial power to deal with conduct protected by the Act from that prohibited by it would likewise be unsatisfactory. Both areas equally involve conduct whose legality is governed by federal law, the application of which Congress committed to the Board, not courts.

"* * * In fact, varying approaches were taken by the Court in initially grappling with this pre-emption problem. Thus, for example, some early cases suggested the true distinction lay between judicial application of general common law, which was permissible, as opposed to state rules specifically designed to regulate labor relations, which were pre-empted. * * * Others made pre-emption turn on whether the States purported to apply a remedy not provided for by the federal scheme, * * * while in still others the Court undertook a thorough scrutiny of the federal Act to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions * * *. For the reasons outlined above none of these approaches proved satisfactory, however, and each was ultimately abandoned. It was, in short, experience—not pure logic—which initially taught that each of these methods sacrificed important federal interests in a uniform law of

labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.

"The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in *Garmon*, 359 U.S., at 244 [79 S.Ct. 773, 3 L.Ed.2d 775]:

" 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.' " (Footnote omitted.)

This line of preemption analysis, which is known as "*Garmon* preemption," "protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." *Metro. Life Ins. Co. v. Massachusetts*, supra, 471 U.S. at 748, 105 S.Ct. 2380, 85 L.Ed.2d 728. When an activity "is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." *Garmon*, 359 U.S. at 246, 79 S.Ct. 773, 3 L.Ed.2d 775. States may not, therefore, "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc.* (1986), 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223.

Garmon preemption does not, of course, apply where the activity sought to be locally regulated falls beyond the arguable reach of Sections 7 and 8 of the NLRA. But it does not necessarily follow that activities ungoverned by these sections are, therefore, controllable by the states. The NLRA does more than indicate Congress's desire for centralized

administration and uniformity in the application of its provisions. It also reveals that certain concerted activities were intentionally left unprotected and unrestricted under the Act because Congress meant for them to be unfettered by the exercise of *any* governmental or regulatory power, including that of the NLRB. "By the Taft-Hartley Act, * * * Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces." *Weber v. Anheuser-Busch, Inc.*, supra, 348 U.S. at 480, 75 S.Ct. 480, 99 L.Ed. 546.

Thus, the Supreme Court has recognized "a second line of pre-emption analysis * * * in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' " *Lodge 76, Internatl. Assn. of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Emp. Relations Comm.* (1976), 427 U.S. 132, 140, 96 S.Ct. 2548, 49 L.Ed.2d 296 ("*Machinists*"), quoting *Natl. Labor Relations Bd. v. Nash-Finch Co.* (1971), 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328. This analysis reflects the NLRA's broader purpose of restoring an equality of bargaining power between labor and management and is invoked primarily in cases involving the use of certain self-help economic weapons to which the parties occasionally resort in an effort to advance their respective bargaining goals. See *Machinists*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (concerted refusal to work overtime); *Gould*, supra, 475 U.S. at 290, 106 S.Ct. 1057, 89 L.Ed.2d 223 (boycott of repeat labor law violators). States are prohibited from imposing additional restrictions on economic weapons of self-help such as strikes or lockouts. *Golden State Transit Corp. v. Los Angeles* (1986), 475 U.S. 608, 615, 106 S.Ct. 1395, 89 L.Ed.2d 616 ("*Golden State I*"); *Local 20,*

Teamsters, Chauffeurs & Helpers Union v. Morton (1964), 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (peaceful secondary picketing).

As explained in *Machinists*, "these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.' [*Natl. Labor Relations Bd. v. Ins. Agents' Internatl. Union, AFL-CIO* (1960), 361 U.S. 477, 498, 80 S.Ct. 419, 4 L.Ed.2d 454.] Rather, both are without authority to attempt to 'introduce some standard of properly "balanced" bargaining power,' [*id.* at 497, 80 S.Ct. 419, 4 L.Ed.2d 454] or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' [*Id.* at 500, 80 S.Ct. 419, 4 L.Ed.2d 454.]" *Machinists*, 427 U.S. at 149-150, 96 S.Ct. 2548, 49 L.Ed.2d 396. Thus, "[t]he *Machinists* rule creates a free zone from which all regulation * * * is excluded." *Golden State Transit Corp. v. Los Angeles* (1989), 493 U.S. 103, 111, 110 S.Ct. 444, 107 L.Ed.2d 420 ("*Golden State II*").

We are initially urged by the state to find that neither *Garmon* nor *Machinists* provides the appropriate analytic framework for deciding this case. According to the state, "*Garmon* preemption does not apply to activity that is merely permissible under section 8 of the NLRA," but instead applies only to "activity protected by section 7 of the NLRA." Thus, the state reasons, "*Garmon* preemption does not preempt R.C. [Chapter] 4116" because "prehire agreements * * * [are not] protected pursuant to section 7." We disagree.

As our discussion of *Garmon* and its progeny indicates, the various references made by the Supreme Court to those activities "protected by § 7" or "prohibited under § 8" are not by way of limitation. The high court has time and again varied the language it used to indicate that this form of

preemption applies when an activity is, e.g., "covered" or "governed by," "the subject of," "arguably" or "potentially subject to," or "within the compass of § 7 or § 8." In any event, there is certainly nothing that prevents Congress from choosing to protect an activity by way of exemption under Section 8 rather than by inclusion in Section 7, and we doubt seriously that the high court would, or could, preclude Congress from structuring its own legislation. Moreover, it was the very construction-industry provisions embodied in Section 8 of the NLRA that the high court was relying on when it stated in *Boston Harbor* that "Congress explicitly authorized" PLAs. *Id.*, 507 U.S. at 233, 113 S.Ct. 1190, 122 L.Ed.2d 565.

The state also maintains that "*Machinists* preemption is completely inapplicable to R.C. [Chapter] 4116." According to the state, this form of preemption applies only where there is a labor dispute, and since appellants "have never identified a labor dispute * * * involving the negotiation of a PLA for the Cuyahoga County Juvenile Detention/Intervention Center * * *, there [is no] occasion * * * to consider whether *Machinists* preemption applies to R.C. [Chapter] 4116." The state takes the position that the *Machinists* rule is designed and applies only to protect against the regulation of "particular economic weapons, such as strikes and lockouts" and challenges appellants "to explain how PLAs constitute economic weapons." Moreover, the state continues, "economic weapons describe tactics" whereas "union-only PLAs are not a tactic at all, but rather an outcome."

The problem with the state's analysis is that it draws on certain principles that are ultimately incompatible with its current position. The NLRA's stated purpose is to remedy "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." Section

151, Title 29, U.S.Code. The NLRA seeks to restore a more equitable balance of bargaining power "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." *Id.* In Sections 7 and 8 of the NLRA (Sections 157 and 158, Title 29, U.S.Code) Congress established a desired balance of bargaining power by protecting certain labor activities, prohibiting others, and leaving still others to be controlled by the free play of economic forces. The *Machinists* doctrine protects activity in the third category against governmental regulation so as to preserve the balance of power that Congress has struck between labor and management in the NLRA.

In *Machinists*, the court explained that "state attempts to influence the substantive terms of collective-bargaining agreements are * * * inconsistent with the federal regulatory scheme * * *. And indubitably regulation * * * of 'the choice of economic weapons that may be used as part of collective bargaining [exerts] considerable influence upon the substantive terms on which the parties contract.' " *Id.*, 427 U.S. at 153, 96 S.Ct. 2548, 49 L.Ed.2d 396, quoting *Natl. Labor Relations Bd. v. Ins. Agents*, supra, 361 U.S. at 490, 80 S.Ct. 419, 4 L.Ed.2d 454. The Supreme Court has since noted, however, that while "[s]uch analysis initially had been used to determine whether certain weapons of bargaining neither protected by § 7 nor forbidden by § 8(b) could be subject to state regulation * * *, [i]t has been used more recently to determine the validity of state rules of general application that affect the right to bargain or to self-organization." *Metro. Life Ins. Co.*, supra, 471 U.S. at 749, 105 S.Ct. 2380, 85 L.Ed.2d 728, fn. 27.

In determining whether state laws of general application are preempted under *Machinists*, the Supreme Court has indeed recognized that a distinction should be drawn between state regulation that interferes with the collective bargaining process itself and state regulation that affects only the substantive terms of collective bargaining agreements. "The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metro. Life*, 471 U.S. at 753, 105 S.Ct. 2380, 85 L.Ed.2d 728. Thus, there is no inconsistency between the NLRA, which is "designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA." *Id.*, 471 U.S. at 754-755, 105 S.Ct. 2380, 85 L.Ed.2d 728.

These same principles dictate a different result, however, with regard to the attempted regulation of PLAs in the construction industry. Given the 1959 amendments to the NLRA that added the construction industry exemptions to Section 8, it cannot be said that Congress is unconcerned with the substantive terms of construction-industry PLAs. To the contrary, these provisions not only address and authorize particular terms and conditions of employment, but also reflect Congress's intent to strike a slightly different balance of power in order to accommodate conditions endemic to that industry. In this regard, we are no longer attempting to ascertain the implications of congressional silence, which is usually the situation in a *Machinists* analysis. Instead, we are dealing with an explicit congressional directive to leave construction-industry PLAs to the operation of economic forces.

Moreover, state laws of general application usually withstand Machinists scrutiny because "[m]ost significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Metro. Life Ins.* Co., 471 U.S. at 756, 105 S.Ct. 2380, 85 L.Ed.2d 728. In contrast, Congress believed that PLAs were both lawful and part of the bargaining process in the construction industry prior to 1959, and enacted the construction-industry exemptions specifically to preserve this pattern and practice. Any state regulatory action that interferes with this pattern of collective bargaining in the construction industry would, therefore, be incompatible with the goals of the NLRA.

Thus, it is of little consequence whether a PLA is characterized as "an outcome" or an "economic weapon," for it is exactly the sort of practice that Congress has preserved for the construction industry. And in any event, the Supreme Court has already indicated that a *Machinists* analysis would apply in determining the validity of regulatory prohibitions of public-construction PLAs. *See Boston Harbor*, supra, 507 U.S. at 232, 113 S.Ct. 1190, 122 L.Ed.2d 565.

The state also argues that even if the NLRA is deemed to authorize certain kinds of PLAs in the construction industry, there is no indication that the 1959 amendments "were intended to codify any activity other than labor organizations' direct dealings with private sector contractors and sub-contractors." Similarly, amicus curiae Ohio Associated Builders & Contractors, Inc. argues that "[b]ecause §§ 8(e) and 8(f) apply only to 'employers,' and public entities are not 'employers' under the NLRA, the provisions applicable to 'employers in the construction industry' found in §§ 8(e) and (f) simply do not apply [to] the State of Ohio and its political subdivisions."

However, as the high court explained in *Boston Harbor*, "Of course, the exceptions provided for the construction industry in §§ 8(e) and (f), like the prohibitions from which they provide relief, are not made specifically applicable to the State. This is because the State is excluded from the definition of the term 'employer' under the NLRA, *see* 29 U.S.C. § 152(2) * * *. Nevertheless, the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections." *Id.*, 507 U.S. at 230-231, 113 S.Ct. 1190, 122 L.Ed.2d 565.

At this juncture, we must conclude that Section 8(f) and the construction-industry proviso to Section 8(e) are clear manifestations of Congress's intent to preclude the states from regulating PLAs in the construction industry. Whether Congress also intended to preclude the NLRB from doing so is not an issue we need to decide. The jurisdiction of the NLRB to regulate construction-industry PLAs is not implicated in the present controversy. Thus, it makes no further difference whether we engage in a *Garmon* or *Machinists* analysis. The application of either rule necessitates a withdrawal of state power, except where the state acts as a market participant.

This brings us to the final and decisive issue in this case, which is whether R.C. Chapter 4116 amounts to government regulation or constitutes proprietary conduct on the part of the state.

In *Boston Harbor*, the Supreme Court held that the NLRA does not prevent a state agency from enforcing a PLA covering a particular public project. In so holding, the court explained:

"When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved

for market freedom, *see Machinists*, or for NLRB jurisdiction, see *Garmon*. A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*." (Emphasis sic.) *Id.*, 507 U.S. at 226-227, 113 S.Ct. 1190, 122 L.Ed.2d 565.

The Supreme Court found that its "decisions in this area support the distinction between government as regulator and government as proprietor." *Id.* at 227, 113 S.Ct. 1190, 122 L.Ed.2d 565. The high court also found that the differences between private and state action "are far less significant when the State acts as a market participant with no interest in setting policy." *Id.* at 229, 113 S.Ct. 1190, 122 L.Ed.2d 565. The court then posed the question "whether a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not 'tantamount to regulation' or policymaking." *Id.*

Answering this question in the affirmative, the court explained:

"Permitting the States to participate freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in these cases, promotes the legislative goals that animated the passage of the §§ 8(e) and (f) exceptions for the construction industry.

"* * *

"There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted

to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." (Emphasis sic.) *Id.*, 507 U.S. at 230 and 231-232, 113 S.Ct. 1190, 122 L.Ed.2d 565.

Critically, however, *Boston Harbor* suggests that a state would be acting as a regulator or policymaker, rather than as a purchaser, proprietor, or market participant, were it to impose an across-the-board rule that either requires or prohibits the use of PLAs on all public construction projects. Thus, the court carefully noted, on the one hand, that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project," and indicated, on the other hand, that "denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*." *Boston Harbor*, 507 U.S. at 232, 113 S.Ct. 1190, 122 L.Ed.2d 565.

Several courts considering this issue have reached similar conclusions. In *United States Chamber of Commerce v. Reich* (C.A.D.C.1996), 74 F.3d 1322, the court held that the NLRA preempted a 1995 executive order issued by former President Clinton that barred the contracting agencies of the federal government from contracting with employers who permanently replace lawfully striking workers. The district court had upheld the executive order, finding that NLRA preemption is inapplicable because the government was

acting in a proprietary capacity. According to the appellate court, the district court had interpreted *Boston Harbor* "as suggesting that if a private contractor were permitted to refuse to buy goods from an employer who permanently replaced strikers—which ordinarily he would be—then so should the federal government." *Id.*, 74 F.2d at 1336. The government, in its arguments, had referred by analogy to two executive orders that were issued by former President Bush in 1992, one of which barred government contractors from entering into Section 8(f) prehire agreements, but neither of which had ever been challenged in court.

In dealing with these contentions, the appellate court explained as follows:

"The premise on which the [Boston Harbor] Court's * * * analysis [of the character of the state's actions] rested, then, was that the Massachusetts governmental entity, [the Water Resources Authority], was not seeking to set general policy in the Commonwealth; it was just trying to operate as if it were an ordinary general contractor whose actions were 'specifically tailored to one particular job, the Boston Harbor clean-up project.' *Id.* at 232, 113 S.Ct. at 1198, 122 L.Ed.2d 565. Surely, the result would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into collective bargaining agreements with the union or its Massachusetts-wide counterpart containing § 8(e) pre-hire agreements. Accordingly, we very much doubt the legality of President Bush's Executive Order 12,818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements under § 8(f).

"It does not seem to us possible to deny that the President's Executive Order [in this case] seeks to set a broad [labor] policy * * *. The President has, of course, acted to set

procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter. * * * Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy. It cannot be equated to the *ad hoc* contracting decision made by MWRA in seeking to clean up Boston Harbor." (Footnote omitted.) *Id.*, 74 F.3d at 1336-1337.

In *Colfax Corp. v. Illinois State Toll Hwy. Auth.* (C.A.7, 1996), 79 F.3d 631, the court determined that the NLRA does not prevent the Authority from entering into a multiproject labor agreement that requires successful bidders to become parties to areawide collective bargaining agreements with the unions having jurisdiction over the relevant work. Despite the scope of these agreements, the court found them to be more akin to the job-specific agreement allowed in *Boston Harbor* than the debarment statute struck down in *Gould*. "The case before us * * * is much more like 'Boston Harbor.' Illinois has not enacted a statute [requiring PLAs on all public projects]. The Authority has not passed [such] a general rule." *Id.*, 79 F.3d at 634. The court cautioned, however, that it would refrain from questioning the Authority's motives in these kinds of cases only "[s]o long as * * * the frontier is pushed no farther from '*Boston Harbor*' than it is here." *Id.*, 79 F.3d at 635.

In *Assoc. Builders & Contrs., Inc. v. San Francisco Airports Comm.* (1999), 21 Cal.4th 352, 87 Cal.Rptr.2d 654, 981 P.2d 499, the Supreme Court of California held that the Airports Commission did not violate that state's statute declaring the right of self-organization when it entered into a PLA in order to complete an expansion and renovation project involving the San Francisco International Airport. In so holding, the court explained that "ABC's argument fails to come to terms with the supremacy of federal labor law, embodied in 29 United States Code section 158(f), which

permits prehire agreements in the construction industry. Any California law purporting to bar such agreements would raise serious questions of preemption under *Machinists* * * *, which prohibits state and municipal regulation of areas that have been left "'to be controlled by the free play of economic forces.'" " *Id.*, 21 Cal.4th at 379, 87 Cal.Rptr.2d 654, 981 P.2d 499.

In *Assoc. Builders & Contrs. of Rhode Island, Inc. v. Providence* (D.R.I.2000), 108 F.Supp.2d 73, the court found the NLRA to preempt a city ordinance giving favorable tax treatment only to developers who execute PLAs on private construction projects with certain affiliated unions. The city claimed that it was acting as a co-developer of the projects by making a contribution in the way of tax stabilization and that because its motives were labor-neutral, it should be found to have acted in a proprietary capacity pursuant to *Boston Harbor*. After declining to "adopt the novel position that the City's alleged labor policy-neutral motive can somehow transform its action into a form of market participation worthy of *Boston Harbor* protection," 108 F.Supp.2d at 83, the court went on to explain:

"Even if the grant of favorable tax treatment may in some circumstances be considered participation in the marketplace or if a labor-neutral motive may save some non-proprietary governmental action from preemption, this case is not a good candidate for the application of those propositions. The City's action in this case is not limited to one particular project, but is rather a policy to be implemented on several projects. This distinction has been important to courts refusing to apply the market participant exception, because a policy, regardless of the motive behind it, is more 'regulatory' than 'proprietary' in nature than a single contracting or, in this case, taxing decision." *Id.*, 108 F.Supp.2d at 83-84.

Thus, as one writer succinctly stated, "state procurement law that does not allow project labor agreements on public works projects at all is a flat prohibition and thus takes state agencies out of any function as private purchasers of services and is 'tantamount to regulation.'" Henry H. Perritt, Jr., Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's *Boston Harbor* Decision (1996), 12 Lab.Law. 69, 88.

On the other hand, two cases have held to the contrary. In *George Harms Constr. Co., Inc. v. New Jersey Turnpike Auth.* (1994), 137 N.J. 8, 644 A.2d 76, the Supreme Court of New Jersey found that the NLRA does not preempt a state from prohibiting PLAs on public projects. The court reasoned:

"Thus, under *Boston Harbor*, federal labor law does not prohibit a state entering the construction market from using the same construction-industry exception regarding project-labor agreements that private purchasers of construction labor use. However, a state's laws may prohibit a project-labor-agreement specification in public contracts without running afoul of the NLRA. *Garmon* preemption does not apply because a state-law prohibition of project-labor agreements on public projects is merely one way in which a state may choose to act as a market participant in the construction industry. In other words, a state may choose to enter or not to enter a project-labor agreement just like any other purchaser of construction services. *Machinists* preemption also does not apply because a state-law prohibition of project-labor agreements on public projects does not constitute impermissible regulation of an area that the NLRA contemplated would be left to the free play of economic forces. Such a prohibition amounts to nothing more than the public equivalent of a corporation's by-law regarding the purchase of construction services. In short, when a state uses project-labor agreements on public projects, it is not acting as a

regulator of private actors; rather, it is merely defining its role as a proprietor/purchaser of labor in the construction industry." *Id.*, 137 N.J. at 26-27, 644 A.2d 76.

Similarly, in *Bldg. & Constr. Trades Dept., AFL-CIO v. Allbaugh* (C.A.D.C., 2002), 295 F.3d 28, petition for certiorari filed Oct. 2, 2002, 71 U.S.L.W. 3283, No. 02-527, the court held that the NLRA does not preempt Executive Order 13,202, 66 F.R. 11225, issued by President George W. Bush on February 17, 2001, which prohibits federal agencies or recipients of federal funding from requiring or prohibiting PLA's in the bid specifications or other authorizing documents for construction projects. In so holding, the court never explained the obvious inconsistency between this decision and its previous discussion in *Reich*, supra, 74 F.3d at 1336-1337, regarding the legality of former President Bush's Executive Order 12,818. Instead, the court essentially reasoned, as did the New Jersey high court in *George Harms Constr. Co., Inc.*, that the government acts as a proprietor, rather than a regulator, when it makes "just 'the type of decision regarding the use of labor agreements that a private project owner would be free to make.'" *Allbaugh*, 295 F.3d at 35, quoting the government's brief. According to the court, the government has acted in a propriety capacity despite the "blanket, across-the-board" prohibition of Executive Order 13,202 "'because "the only decisions governed by the executive order are those that the federal government makes as [a] market participant.'" *Id.*, quoting the government's brief.

This reasoning, we believe, places the proverbial cart before the horse. These courts assume that a state acts as a market participant by doing what a private actor may do under the NLRA. But the gist of *Boston Harbor* is that a state may act as a private contractor would act *when it acts as a market participant*. Otherwise, the state would be permitted to regulate within a protected zone because a private actor

may do so. As the New Jersey Supreme Court points out, for example, a private corporation may in its bylaws or elsewhere decide as a matter of policy never to utilize a PLA when purchasing construction services without running afoul of the NLRA. But this is not because such a decision is inherently indicative of proprietary activity. Indeed, the private contractor-developer in this situation would be acting not as a typical contractor would act in the furtherance of its proprietary interests, but as a "regulator" of the construction market. Instead, a private corporation or other legal entity may make such a policy decision without violating the NLRA because the NLRA does not preclude a private actor from attempting to regulate in an area reserved for market freedom or NLRB jurisdiction.

Thus, as the Supreme Court explained in *Boston Harbor*:

"The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. The private actor under such circumstances would be attempting to 'regulate' the suppliers and would not be acting as a typical proprietor. The fact that a private actor may 'regulate' does not mean, of course, that the private actor may be 'pre-empted' by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may 'regulate' as they please, as long as their conduct does not violate the law. As the above passage in *Gould* [475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223] makes clear, however, states have a qualitatively different role to play from private parties. [*Id.*] When the state acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties.

These distinctions are far less significant when the State acts as a market participant with no interest in setting policy." *Id.*, 507 U.S. at 229, 113 S.Ct. 1190, 122 L.Ed.2d 565.

We cannot conceive of R.C. Chapter 4116 as anything but regulation. R.C. Chapter 4116 is all about labor policy. Its stated purpose is "to prohibit public authorities from imposing certain labor requirements as a condition of performing public works." Preamble to 1999 Am.H.B. No. 101. Rather than constituting proprietary conduct on the part of the state, R.C. Chapter 4116 essentially prohibits the state, its contracting authorities, and any institution supported in whole or part by public funds from engaging in proprietary activity when purchasing construction services or directly employing labor by prohibiting them from entering into or enforcing a PLA on any public construction project regardless of economic or other proprietary concerns. Indeed, as the Cuyahoga County Board of Commissioners itself bemoans, the statute "eliminates the discretion of local authorities to determine whether and when a project labor agreement would benefit local taxpayers and citizens by providing consistency and harmony in the vast array of labor and employment issues which arise during the course of a costly and time expansive public improvement project."

R.C. Chapter 4116 is a blanket, across-the-board prohibition that precludes any sort of ad hoc determination as to the benefits or advantages of utilizing a PLA on a particular project. It is, therefore, "'tantamount to regulation' or policymaking." *Boston Harbor*, 507 U.S. at 229, 113 S.Ct. 1190, 122 L.Ed.2d 565.[1]

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[1] *Amici curiae* Ohio ABC and National Right to Work Legal Defense Foundation argue that R.C. 4116.02(B) is a "right-to-work" law and, therefore, is saved from preemption by Section 14(b) of the NLRA, Section 164(b), Title 29, U.S.Code, which permits states, if they so choose, to prohibit "agreements requiring membership in a labor

Accordingly, we hold that Sections 8(e) and (f) of the National Labor Relations Act, as enacted by the 1959 Landrum-Griffin Act, Sections 158(e) and (f), Title 29, U.S.Code, preempt R.C. Chapter 4116, as enacted by Am.H.B. No. 101 of 123rd General Assembly, which flatly prohibits public authorities from entering into or enforcing project labor agreements on public construction projects.

For all of the foregoing reasons, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court declaring R.C. Chapter 4116 preempted by the NLRA and enjoining its enforcement.

This opinion is "SUBJECT TO FURTHER EDITING." It has been posted to the website of the Supreme Court of Ohio as a manuscript document in the interest of disseminating it to the public on an expedited basis. This document will be replaced with the final version when the final version becomes available. Please call suggested corrections to the attention of the reporter's office at reporter@sconet.state.oh.us.

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organization as a condition of employment." We find, however, that this is not an issue that has been properly raised in this case. As the state informs us, it "has not advanced a right-to-work argument in its defense of R.C. [Chapter] 4116" and has no interest in this "hypothetical" and "academic" debate. Instead, the state urges us to consider only those "arguments the State has actually made" and "not decide this theoretical issue." We point out also that while the court of appeals did briefly discuss Section 14(b), it did so only to bolster its view that R.C. Chapter 4116 does not "have the effect of prohibiting a public authority from entering into a PLA." In any event, we decline the invitation to construe R.C. Chapter 4116 as some cryptic prohibition of so-called "union shop" or "agency shop" agreements in Ohio. But even if we did so construe R.C. 4116.02(B), we very much doubt the applicability of Section 14(b) in the circumstances of this case. See *Assoc. Gen. Contrs. of N. Dakota v. Otter Tail Power Co.* (C.A.8, 1979), 611 F.2d 684, 692-693.

Judgment reversed.

DOUGLAS, F.E. SWEENEY and PFEIFER, JJ., concur.

DOUGLAS, J., concurs separately.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in syllabus and judgment.

COOK, J., concurs in judgment only.

DOUGLAS, J., concurring.

I concur with the exhaustive and well-reasoned opinion of Justice Resnick. I write in support of the majority opinion.

When all of the layers of obfuscation of the issue now before us are peeled away, the core question is whether the state may, within constitutional limits, enact legislation that prohibits project labor agreements from being entered on public construction projects. While R.C. Chapter 4116 does just that and, by so doing, effectively takes away the discretion of local elected officials to look out for the best interest of local taxpayers and citizens, and that, on its face, is bad public policy, it is not for us to decide policy. It is our task, however, to test such legislation by the parameters laid down by case law of the United States Supreme Court, when applicable, and we are bound to follow and comply with such pronouncements.

In this matter, the pertinent case law, which we are required to apply and follow, might very well begin and end with *Bldg. & Constr. Trades Council of Metro. Dist. v. Assoc. Builders & Contrs. of Massachusetts/Rhode Island, Inc.* (1993), 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (the "*Boston Harbor*" case). Therein, the high court said that "[t]he 1959 amendment adding a proviso to subsection [8](e) [of the National Labor Relations Act, Section 158, Title 29, U.S.Code] permits a general contractor's prehire agreement to require an employer not to hire other contractors

performing work on that particular project site unless they agree to become bound by the terms of that labor agreement." *Id.* at 230, 113 S.Ct. 1190, 122 L.Ed.2d 565. In addition, section 8(f) of the Act unequivocally permits employers in the construction industry to enter into prehire agreements. While it is true that the Act excludes the state from the definition of the term "employer," Section 2(2), NLRA, Section 152(2), Title 29, U.S.Code, the court, nevertheless, went on to say that "the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections." *Id.* at 231, 113 S.Ct. 1190, 122 L.Ed.2d 565.

It would seem to be axiomatic that what federal law gives to a person or entity, the state may not take away. To remove from local officials the right to use a tool that, for the most part, guarantees that a local project will be completed by well-trained workers, within budget and on time, is short-sighted at best and devastating at worst. Not much more, I believe, needs to be said to put to rest the arguments made here by appellees and their *amici* supporters.

Accordingly, I would pronounce as syllabus law in this case that "Am.H. B. No. 101, a regulation that prohibits public-sector project labor agreements in Ohio, is preempted by the National Labor Relations Act, Sections 151 *et seq.*, Title 29, U.S.Code, and is, therefore, unlawful." I respectfully concur with the majority.

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In the Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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In their supplemental brief, petitioners assert (at 1) that the Ohio Supreme Court's recent decision in *Ohio State Building & Construction Trades Council* v. *Cuyahoga County Board of Commissioners*, No. 2001-2036 (Dec. 27, 2002) (Supp. Br. App. 1sa-36sa), "conflict[s]" with the District of Columbia Circuit's decision in this case. Contrary to petitioners' suggestion, the two decisions do not conflict. Nor does the Ohio Supreme Court's reasoning in *Cuyahoga County* undermine the validity of the presidential Executive Order at issue in this case.

This case involves a challenge to an Executive Order issued by the President of the United States. The Ex-

ecutive Order directs federal agencies, "[t]o the extent permitted by law," to ensure that bid specifications for federal and federally funded construction contracts neither require contractors to enter into project labor agreements (PLAs) with unions nor prohibit contractors from doing so. Pet. App. 74a-75a. The *Cuyahoga County* case involves a challenge to a state statute that directs all "public authorit[ies]" in the State to ensure that the bid specifications for their construction contracts do not "require a contractor or subcontractor" to enter into a PLA for the project. Supp. Br. App. 11sa-12sa (quoting statute).

The Ohio Supreme Court did not dispute that the State would engage in proprietary activity, which is not subject to preemption analysis under the National Labor Relations Act (NLRA), if it decided on a project-by-project basis not to require PLAs on its own construction contracts. The court nonetheless reasoned that the same sort of decision is a regulatory one, and thus is subject to NLRA preemption analysis, when the State makes it on an "across-the-board" basis. Supp. Br. App. 33sa. As the court of appeals recognized in this case, such a distinction has "no logical justification." Pet. App. 12a.[1]

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[1] The Ohio Supreme Court extensively relied (Supp. Br. App. 26sa-28sa) on dicta in *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996), suggesting that the first President Bush had not acted in a proprietary capacity in issuing an earlier Executive Order involving PLAs that applied "across-the-board." As the D.C. Circuit explained in this case, such reliance "misread[s]" *Chamber of Commerce*, which held that the Executive Order of President Clinton that was at issue in that case "was regulatory not because it decreed a policy of general application, as opposed to a case-by-case regime, but because it disqualified companies from contracting with the Government on the basis of con-

Even if, however, the Ohio Supreme Court were correct in concluding that the preemption doctrines under the NLRA require *a state or local government* to make proprietary decisions on its own construction projects on a project-by-project basis, it would not follow that the quite different principles governing the validity of actions of *the President of the United States* require that he do so as well. As previously explained (Gov't Br. in Opp. 13), the President is vested with authority under a separate Act of Congress—the Federal Property and Administrative Services Act of 1949 (Procurement Act), 41 U.S.C. 251 *et seq.*—to establish policies on proprietary matters for the United States government. The President has also been vested with authority under Article II of the Constitution to supervise the officers of the Executive Branch in performing their duties under the various laws, including those governing grants, that they are charged with administering. See Pet. App. 6a-7a. The question in this case therefore turns on the accommodation of the different sources of authority under *federal* law—the vesting of regulatory authority in the National Labor Relations Board under the NLRA and the vesting of authority in the President under the Constitution and the Procurement Act. Those different grants of authority must be read harmoniously, if possible. See generally *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995). NLRA preemption, by contrast, involves restraints on the regulatory actions of state and local governments by operation of the Supremacy

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duct unrelated to any work they were doing for the Government." Pet. App. 12a. The court observed that the Executive Order at issue here, in contrast, "extends only to work on projects funded by the government." *Id.* at 13a.

Clause. See *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists*). It is thus untenable to view *Machinists* preemption under the NLRA as constraining the President's ability to act on an "across-the-board" basis to establish policies for the Executive Branch with respect to the efficient and effective use of federal funds. See Gov't Br. in Opp. 13-14, 15-16.

Aside from the central distinction that the Executive Order in this case is the action of the President whereas the Ohio statute in *Cuyahoga County* is the action of a state government, there are other distinctions between the Executive Order and the statute as well. For example, as the court of appeals recognized in this case, the Executive Order is designed "to ensure the most effective use of [the government's] funds." Pet. App. 11a; see *id.* at 74a (reciting that the Executive Order is designed to "promot[e] the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects"). The court of appeals thus understood that the President was acting out of the same proprietary concerns as would private project owners, contractors, or lenders in deciding whether to use PLAs.

In contrast, the Ohio Supreme Court perceived the statute in *Cuyahoga County* as designed not as a means of ensuring efficient procurement, but instead as an instrument of "labor policy," Supp. Br. App. 33sa, designed to "prohibit so-called 'project labor agreements' in the State of Ohio," *id.* at 12sa-13sa (quoting statement of sponsor). See *id.* at 33sa (quoting preamble to bill enacting statute) (purpose is "to prohibit public authorities from imposing certain labor requirements"). It is significant in this regard that the Ohio statute is not, by its terms, confined to construction contracts

receiving state funds. See *Ohio State Bldg. & Constr. Trades Council* v. *Cuyahoga County Bd. of Comm'rs*, Nos. 77242 & 77262, 2001 WL 1152900, at *12 (Ohio Ct. App. Sept. 27, 2001) (Rocco, J., concurring in part and dissenting in part) (noting that the statute "regulates not only the state itself as a purchaser but almost every governmental entity in the state and, more tellingly 'any institution supported in whole or in part by public funds'") (quoting Ohio Rev. Code Ann. § 4116.01(A) (Anderson 2001) (defining "public authority")). The *Cuyahoga County* case thus involved a statute whose text and purpose were quite different from the text and purpose of the Executive Order issued by the President in the exercise of his proprietary authority.

Moreover, the Executive Order provides that federal agencies and federal fund recipients are not to "[r]equire *or prohibit* bidders, offerors, contractors or subcontractors to enter into or adhere to" PLAs on federal and federally funded construction projects. Pet. App. 74a (emphasis added); see *id.* at 75a. The Executive Order thereby "maintain[s] Government neutrality toward Government contractors' labor relations" on such projects. *Id.* at 74a. The Ohio statute, in contrast, provides only that public authorities cannot "require a contractor or subcontractor" to enter into a PLA, Supp. Br. App. 11sa, and thus, unlike the Executive Order, allows public authorities to prohibit contractors or subcontractors from doing so.

In sum, because the Executive Order of the President in this case differs in significant respects from the state statute in *Cuyahoga County*—and because the governing legal principles in the two cases have fundamentally different groundings in the Constitution—the Ohio Supreme Court's decision does not conflict with the court of appeals' conclusion that the President acted

in a proprietary capacity in issuing the Executive Order or cast doubt upon the validity of the President's action in doing so.

* * * * *

For the reasons stated above and in the government's brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JANUARY 2003